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No. _____

In The

# Supreme Court of the United States

October Term, 1996

DAVID M. SCHLESSINGER,

*Petitioner,*

v.

GEORGE SALIMES, TOWN OF GENEVA, TOWN OF GENEVA BOARD, RICHARD PLOCH, Chairperson of the Board, RICHARD BEHOF, Member of the Board, KENNETH PIANTINO, Member of the Board, TOWN OF GENEVA POLICE DEPARTMENT, EDWARD GRITZNER, GEORGE CONDOS, ANTHONY'S STEAKHOUSE INC., Individually, Jointly, and Severally,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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68 pp

## QUESTIONS PRESENTED

1. In a 42 U.S.C. § 1983 action, is a police officer entitled to a qualified immunity defense for making a threat of an arrest, where there is not a violation of law, to collect a civil debt involving a disputed consumer product or service.

2. Did the Seventh Circuit, applying the Fed.R.App.P. 38 and Circuit Rule 38, abuse its discretion when the opinion lacked the required analysis on the issue of qualified immunity and the language of the opinion distracted and diverted attention away from construing the case in the light most favorable to the petitioner thereby resulting in a due process violation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATEMENT ..... 2

REASONS FOR GRANTING THE PETITION ..... 9

I. The decision of the Court of Appeals was erroneous because it did not analyze the qualified immunity issue in the light most favorable to the plaintiff appealing the qualified immunity claim ..... 9

II. The Seventh Circuit abused its discretion to sanction the case ..... 20

III. The Seventh Circuit became embroiled in the case and created a due process violation for the appeal and the sanctioning process ..... 22

CONCLUSION ..... 25

APPENDIX A ..... App. 1

APPENDIX B ..... App. 9

APPENDIX C ..... App. 11

APPENDIX D ..... App. 13

APPENDIX E ..... App. 20

APPENDIX F ..... App. 34

## TABLE OF AUTHORITIES

Page

CASES

*Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) ..... 21

*Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) ..... 18

*Bakalis v. Golembeski*, 35 F.3d 318 (7th Cir. 1994) ..... 22

*California v. Hodari D.*, 499 U.S. at 625, 111 S.Ct. 1550 (1991) ..... 15

*Cassidy v. Tackett*, 938 F.2d 693 (6th Cir. 1991) ..... 15

*Eberhardt v. O'Malley*, 17 F.3d 1023 (7th Cir. 1994) .... 17

*Elder v. Halloway*, 510 U.S. 510, 114 S.Ct. 1019 (1994) ..... 9, 10, 13, 17, 24

*Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) ..... 14, 15

*Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) ..... 18

*Jones by Jones v. Webb*, 45 F.3d 178 (7th Cir. 1995) .... 17

*Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994) ... *passim*

*Lojuk v. Johnson*, 770 F.2d 619 (7th Cir. 1985) *cert. denied*, 474 U.S. 1067 (1986) ..... 17

*Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) ..... 21

*McDonald v. Haskins*, 966 F.2d at 294 (7th Cir. 1992) .... 17

*N.L.R.B. v. Lucy Ellen Candy Division*, 517 F.2d 551 (7th Cir. 1975) ..... 21

TABLE OF AUTHORITIES – Continued

Page

*Rakovich v. Wade*, 850 F.2d 1180 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988) ..... 17

*Ruderer v. Fines*, 614 F.2d 1128 (1980) ..... 21

*Simmons v. Pryor*, 26 F.3d 650 (7th Cir. 1993) *cert. denied*, ___ U.S. ___, 114 S.Ct. 1833, 128 L.Ed.2d 461 (1994) ..... 11, 23

*Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 1697, 41 L.Ed.2d 897 (1974) ..... 22, 23

*United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) ..... 13, 14

*Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d (1975) ..... 22

*Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) ..... 18

STATUTES

28 U.S.C. § 1254 ..... 1

42 U.S.C. § 1983 ..... 2

Wis. Stats. § 943.21 ..... 5, 19

Wis. Stats. § 943.30(1) ..... 6, 20

RULES

Circuit Rule 38 ..... 7

Fed.R.App.P 38 ..... 7

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

David M. Schlessinger, by his counsel of record, Andrew J. Shaw, respectfully petitions for a writ of certiorari to review the judgement[1] and sanction of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals 100 F.3d 519 (1996) is reported.

The opinion of the District Court (No. 94-C-1154) is unreported.

## JURISDICTION

The Court of Appeals entered its judgement on November 15, 1996.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254.

[1] The Petition for Writ of Certiorari in this case is narrow with respect to the qualified immunity issue. If the Writ of Certiorari is granted, Schlessinger is requesting a narrow review of the issue whether a law enforcement officer is entitled to a qualified immunity for making a threat of an arrest, where there is not a violation of law, to collect a civil debt. With respect to the second issue, did the Seventh Circuit abused its discretion in sanctioning this case.

## STATEMENT

Mr. David Schlessinger sued Town of Geneva police officer George Salimes ("Officer Salimes"), the Town of Geneva, the Town of Geneva Board, the Town of Geneva Police Department, and several members of those respective entities (collectively, the "Town of Geneva defendants"), under 42 U.S.C. § 1983.[2] Mr. Schlessinger alleged that Officer Salimes violated Mr. Schlessinger's constitutional rights when Officer Salimes told Mr. Schlessinger to either pay the entire bill and leave immediately or he would immediately place Mr. Schlessinger in handcuffs and lock him up for disorderly conduct and theft.

### Facts as Stated in the District Court's Summary Judgment Decision[3]

On January 8, 1994, Mr. Schlessinger and two friends went to Anthony's Steakhouse in the Town of Geneva. See the true and correct copy of the District Court's

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[2] Attorney Thomas M. Barrett initiated the law suit in the United States District Court for the Eastern District of Wisconsin naming defendants in the above caption. The District Court dismissed on a summary judgment motion on the issue of qualified immunity and the remaining state claims dismissed on jurisdiction. After summary judgment, Attorney Thomas M. Barrett referred this case to Attorney Andrew J. Shaw for the appeal to the Seventh Circuit. Attorney Andrew J. Shaw appealed the qualified immunity issue and the jurisdictional issue.

[3] The facts are supplied by the District Court's summary judgment decision. These summary judgment facts were composed from the proposed finding of facts submitted by all counsel for the above captioned matter. The facts in the Seventh Circuit Court of Appeals differs significantly.

summary judgment decision, page 2, as marked as Exhibit "D". (Hereinafter "Sum. Judg."). They all ordered steaks done medium well but were dissatisfied with the way the steaks were prepared. (Sum. Judg. p. 2) Mr. Schlessinger alleges that the steaks were burned, butterflied (sliced in half), and not prepared according to his and his friends requests. (Sum. Judg. p. 2) Although his friends said they were willing to eat the steaks, Schlessinger refused. (Sum. Judg. p. 2) He asked the waitress for new steaks and then asked to speak to the manager because he felt the waitress was rude. (Sum. Judg. p. 2) The owner came, examined the steaks, and said there was nothing wrong with them. (Sum. Judg. p. 2) They argued. (Sum. Judg. p. 2) The owner told Schlessinger that if he did not pay for the steaks and leave, he would call the police. (Sum. Judg. p. 2) Mr. Schlessinger called the police himself from his cellular phone. (Sum. Judg. p. 2) While Schlessinger was waiting in the lobby, George Condos, the chef, told him that when the police arrived, they would arrest him. (Sum. Judg. p. 2)

Two Town of Geneva officers, including George Salimes, arrived at the restaurant. (Sum. Judg. p. 3) Officer Salimes and the owner exchanged familiarities. (Sum. Judg. p. 3) Mr. Condos told the police that the plaintiff was probably high on drugs and was refusing to pay for food he ate. (Sum. Judg. p. 3) Mr. Condos also told Officer Salimes that he should search Schlessinger for drugs and take him to jail. (Sum. Judg. p. 3) Schlessinger told Officer Salimes that he was not happy with the steak, that he had not touched it, and that he had asked the restaurant to prepare another one but that they refused. (Sum. Judg. p. 3) He also told Officer Salimes that the chef and the

owner were abusive and referred to him as a drug user. (Sum. Judg. p. 3) Finally, he told Officer Salimes that he would pay for his dinner when he got his proper order. (Sum. Judg. p. 3)

Officer Salimes refused to go and look at the food. (Sum. Judg. p. 3) He told Mr. Schlessinger to either pay the entire bill and leave immediately or he would immediately place Mr. Schlessinger in handcuffs and lock him up for disorderly conduct and theft. (Sum. Judg. p. 3) Mr. Schlessinger paid the bill and left. (Sum. Judg. p. 3)

Mr. Schlessinger alleges that after he left the restaurant he was followed by a white squad car. He believes that it was a Town of Geneva squad intentionally harassing him. (Sum. Judg. p. 3)

Mr. Schlessinger alleges that he was coerced into paying for the food despite the fact that he had not eaten it. (Sum. Judg. p. 3) He felt he would be restrained and jailed, and that he felt mentally coerced by his belief that Officer Salimes was serious about his threat of arrest. (Sum. Judg. p. 3)

## Analysis of Qualified Immunity by the District Court

The District Court dismissed on a summary judgement motion on the issue of qualified immunity and the remaining state claims dismissed on jurisdiction. (Sum. Judg. p. 7) The District Court stated that "Viewing the facts in a light favorable to Mr. Schlessinger, a reasonable person could conclude that he was not free to leave; Officer Salimes had seized him." (Sum. Judg. p. 5 f.n. 2). However, the District Court stated that Schlessinger

failed to establish that the seizure would have been unreasonable since Wisconsin Stat. § 943.21 provides that a person can be imprisoned for fraud on a restaurant keeper where that person, "[h]aving obtained any food . . . at any restaurant, intentionally absconds without paying for it."

**Rationale for Appeal**

The police officer threatening arrest in this consumer contextual setting was not objectively reasonable under the law and should not be protected under qualified immunity. The threat of arrest based upon Wis. Stat. § 943.21 allowing imprisonment for fraud on a restaurant keeper where that person "absconds"[4] food at a restaurant was objectively unreasonable. There was no secrecy concerning the complaint about the food, the food was not eaten, and Schlessinger did not try to hide himself in any manner.[5] The officer's conduct of threatening arrest should not be used as a collection agency in the consumer contextual setting where a customer is unhappy about the product as well as the service. This conduct of threatening arrest in this setting was not reasonable under the law

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[4] "Abscond" means to depart clandestinely. (Webster's New International Dictionary (2d ed)).

[5] The District Court's analysis proposed that "although contrary to the maxim that 'the customer is always right,' the language of the statute could be interpreted to find Schlessinger obtained his food and intended to leave without paying. Subsequent case law provides no guidance. Thus, although the court questions whether an arrest for fraud would have been lawful, Officer Salimes' threat of arrest could have been reasonable under § 943.21." (Sum. Judg. p. 6)

and should not be protected under the qualified immunity doctrine.

**Seventh Circuit Court of Appeals Ruling**

On October 28, 1996, an oral argument was held in the United States Court of Appeals for the Seventh Circuit.

On November 15, 1996, the Court of Appeals decision affirmed the judgement of the District Court, but contrary to the District Court's analysis of the qualified immunity issue. The Court of Appeals opinion stated that "Because Salimes did not violate the Constitution, we need not dwell on the immunity question . . . " See true and correct copy of the Seventh Circuit's Opinion, page 6, marked as Exhibit "A" (Hereinafter "Ct. App. Op.")[6] The Seventh Circuit's opinion did not go through the legal analysis to determine whether the police officer was outside his scope of qualified immunity. The Seventh Circuit ignored *Kernats v. O'Sullivan,* 35 F.3d 1171 (7th Cir. 1994).[7]

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[6] The Court of Appeals did not address the "absconding" analysis of the District Court, but rather on its own determined Schlessinger's affidavit did not explicitly dispute the disorderly conduct and therefore ruled that there was no dispute that disorderly conduct was committed. No where in the District Court's summary judgment was the issue of disorderly conduct considered as being the basis for making a reasonable threat of an arrest. The District Court based their analysis of threat being reasonable under § 943.21, Wis. Stat. Using the contextual setting of this case, Schlessinger's affidavit does not support disorderly conduct.

[7] In *Kernats v. O'Sullivan,* 35 F.3d 1171 (7th Cir. 1994), a qualified immunity analysis was specifically outlined for

The facts stated in the Seventh Circuit's opinion were significantly different than those of the District Court's decision, diminishing, changing, and omitting several facts critical to proving merit of this case according to the factors required to find a police officer outside the scope of qualified immunity found in *Kernats v. O'Sullivan*. Additionally, throughout the totality of the decision, the Seventh Circuit's decision contained several comments concerning Schlessinger, his attorney, and his case, including "nutty," "goofy," "loopy," and "wise guy". (Ct. App. Op.)

Seventh Circuit affirmed the judgement of the District Court with costs and directed Schlessinger and his attorney to show cause for why they should not be penalized under Federal Rule of Appellate Procedure 38 and Circuit Rule 38 for pursuing a frivolous appeal.

On November 27, 1996, Schlessinger submitted a letter, and his attorney submitted an affidavit for why the appeal was made in good faith and should not be penalized. See a true and correct copy of the affidavit and attached letter marked as Exhibit "E".

On December 23, 1996, the Seventh Circuit reasoned that the appeals were frivolous under Fed. R. App. 38 and Circuit Rule 38 and sanctioned Schlessinger and his attorney for reasonable legal fees incurred by the defendants. The order relied upon their opinion dated November 15, 1996.[8] See a true and correct copy of the sanction order as marked as Exhibit "B".

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specific tests for Fourth Amendment seizure to determine whether a police officer was outside his scope of his immunity.

[8] "Substantially for the reasons given in our opinion, we

On January 13, 1997, Schlessinger's attorney submitted an affidavit objecting to the legal fees. The attorney requested copies of billings with the breakdown of legal hours from the start of the law suit to the point of sanction in order to substantiate the submitted amounts of defendant-appellees' attorneys and to be able to determine whether the work listed was duplicated from the work done for the District Court pleadings and hearings. See a true and correct copy of the affidavit as marked as Exhibit "F".

On February 4, 1997, the Seventh Circuit issued an order against Schlessinger and his attorney assessing sanctions on them based upon the aggregate amounts submitted by the appellate-attorneys. The Seventh Circuit awarded the aggregate amounts over the objections. See true and correct copy of February 4, 1997 order marked as Exhibit "C".

Schlessinger now respectfully writes this petition for a review of the judgement[9] regarding the immunity question and the sanction of the United States Court of Appeals for the Seventh Circuit in this case.

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now conclude that the appeals are indeed frivolous . . . [We] did not issue the order because we had a particular view of the facts; the order was based on unreasoned, even irresponsible, legal contentions that took a small-claims matter away from state court and brought it to a United States Court of Appeal. . . . " (December 23, 1996 order)

[9] The request for review is narrow with respect to the issue of whether Officer Salimes is entitled to qualified immunity given the case facts. As explained in the footnote 1, Attorney Andrew J. Shaw was referred this case after the summary judgment. He did not initiate the lawsuit naming all parties.

## REASONS FOR GRANTING THE PETITION

This case is a timely and rare opportunity to provide guidance on qualified immunity analysis in Fourth Amendment seizure cases involving law enforcement officers in dealing with consumer disputes regarding products and services. There are systemic reasons why few of the district courts decisions receive appellate review. The decision below is erroneous, and the appeal of qualified immunity was never addressed or analyzed, contrary to *Elder v. Halloway,* 510 U.S. 510, 114 S.Ct. 1019 (1994). In *Elder v. Halloway,* this Court held that appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to or discovered by the district court. *Id.* at 511. Moreover, the sanction was an abuse of discretion because the merits of case were never analyzed.

### I. The decision of the Court of Appeals was erroneous because it did not analyze the qualified immunity issue in the light most favorable to the plaintiff appealing the qualified immunity claim.

This Court's decisions dictate how qualified immunity cases must be analyzed by lower and circuit courts. In making the determination of whether an official is entitled to qualified immunity, court of appeals should first look to Supreme Court decisions, then to decisions of the courts within the circuit, and finally to decisions of other courts. The Seventh Circuit Court of Appeals did not apply several relevant precedents of the Supreme Court and the Seventh Circuit Court of Appeals concerning the analysis of this qualified immunity case. The

Seventh Circuit did not apply the Seventh Circuit case of *Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994). In *Kernats*, a qualified immunity analysis was specifically outlined for specific tests for Fourth Amendment seizure to determine whether a police officer was outside his scope of qualified immunity. The Seventh Circuit's lack of analysis makes this decision unavailable to use as precedent for future qualified immunity cases and more importantly did not afford the chance for this case to be heard in a fair and complete manner.

The Seventh Circuit is required by Supreme Court cases to consider all relevant precedents when reviewing qualified immunity cases. In *Elder v. Halloway*, 510 U.S. 510, 114 S.Ct. 1019, 1020 (1994), this Court held that appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to or discovered by the district court. A court of appeals reviewing a qualified immunity judgement should therefore use its full knowledge of its own and other relevant precedents. *Id.* at 511. A court of appeals also may not release defendants as being immune because of shortages in counsels' or the court's legal research or briefing. *Id.* at 511. The Seventh Circuit did not follow the guidelines proposed by *Elder v. Halloway*. The Seventh Circuit failed to analyze the qualified immunity issue thereby making it erroneous to release defendants as being immune until this analysis is completed.

**Qualified Immunity Reviewed De Novo**

At the heart of this petition is the error that the Seventh Circuit construed the record of this case in the

light most favorable to defendants arguing qualified immunity rather than in the light most favorable to the plaintiff appealing the qualified immunity claim. The Seventh Circuit case of *Simmons v. Pryor* has made it clear that, "We review the district court's grant of summary judgement de novo, construing the record in the light most favorable to [plaintiff appealing the qualified immunity claim] and according him the benefit of all reasonable inferences." *Simmons v. Pryor*, 26 F.3d 650, 653 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1833, 128 L.Ed.2d 461 (1994). The Seventh Circuit reviewed the case backwards giving all the credibility and benefit to the defendants while giving no credibility and benefit to the plaintiff.

Giving all credibility and benefit to the defendants, Seventh Circuit ignored the District Court's analysis that Officer Salimes had seized Schlessinger, and the District Court held that this seizure could have been reasonable under § 943.21, Wis. Stat. (Sum. Judg. p. 6) Instead, Seventh Circuit allowed themselves to use defendants' affidavits and ruled that Schlessinger's affidavit did not explicitly state that he was not disorderly. (Ct. App. Op. p. 6) The District Court had never even discussed that disorderly conduct was even a possibility. Had the Seventh Circuit correctly construed the record in a light most favorable to Schlessinger, the Seventh Circuit using the contextual setting would have gone through the analysis of the District Court and would have had to take into account the District Court's analysis disregarding disorderly conduct as being committed in this case.

**The language in the Seventh Circuit's opinion distracted and diverted attention away from the issue of qualified immunity.**

Additionally, the Seventh Circuit permitted themselves to make comments in the opinion about Schlessinger, his attorney, and his case. These comments include the following:

I. "Schlessinger's lawyer (yes, he has one) (Ct. App. Op. p. 4)

ii. "But having played the wise guy in calling the police, Schlessinger encored that performance by filing this suit. . . . " (Ct. App. Op. p. 2)

iii. "This goofy lawsuit deservedly met an abrupt end in the district court." (Ct. App. Op. 2)

iv. "The contention is nutty." (Ct. App. Op. p. 5)

v. "a litigant may [not] snooze through a case" (Ct. App. Op. p. 5)

vi. "true to form, Schlessinger's lawyer propounds a loopy thesis" (Ct. App. Op. p.6)

vii. "if your meal is not tasty, you do not throw a tantrum" (Ct. App. Op. p. 6)

These quoted comments from the opinion distract and divert attention away from the issue of whether the officer is entitled to qualified immunity when he makes a threat of an arrest, where there is not a violation of law, to collect a civil debt. This required analysis is integral to a complete and fair hearing of this claim.

The appeal to the Seventh Circuit was based upon qualified immunity, but the Seventh Circuit did not go through the qualified immunity analysis.[10] Instead, Seventh Circuit ruled that George Salimes did not violate the Constitution, and therefore, the Seventh Circuit does not need to dwell on the immunity question. (Ct. App. Op. p. 6). The Seventh Circuit's opinion completely ignored the obligation of completing the qualified immunity analysis under *Elder v. Halloway* and took liberty with the critical facts by omission, diminishment and changes of several critical facts.

The Seventh Circuit did not even mention *Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994), a case on point that outlined the Supreme Court and Seventh Circuit analysis and tests required to determine whether a police officer is outside the scope of qualified immunity. Had the Seventh Circuit gone through the *Kernats* analysis and tests required to determine the qualified immunity issue for a police officer, it would have been clear that the facts of this case arguably meet every single criteria necessary to find an officer outside the scope of qualified immunity.

The *Kernats v. O'Sullivan* case provides an outline of the Supreme Court and Seventh Circuit's analysis and tests required to determine whether a police officer is outside the scope of qualified immunity. *Kernats* cited the important case of *United States v. Mendenhall*, which states that "A person has been 'seized' within the meaning of

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[10] The appeal was based upon the District Court ruling that "Salimes and Town of Geneva defendants are entitled to qualified immunity . . . The motion for summary judgment is granted" (Sum. Judg. p.2)

the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Kernats* at 1177 citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). The Seventh Circuit did not mention *Mendenhall* in their opinion even though it was relevant precedent in the District Court or that the District Court stated concerning this test that, "Viewing the facts in a light most favorable to Mr. Schlessinger, a reasonable person could conclude that he was not free to leave; Officer Salimes had seized him." (Sum. Judg. p.5 f.n. 2) The Seventh Circuit did not acknowledge that the District Court had already found the facts of this case to have met one of the most significant tests for finding the police officer outside the scope of qualified immunity.

As stated above, the District Court had already found that seizure had occurred in this case. No further analysis was necessary to prove seizure in the Seventh Circuit's opinion. But even broken down into factors of seizure, the tests cited in *Kernats* to determine each factor of seizure would have clearly been met had the Seventh Circuit gone through the complete qualified immunity analysis. *Kernats* cited *Florida v. Bostick* which states the "[T]he appropriate inquiry [to determine coercion] is whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter." *Kernats* at 1177 citing *Florida v. Bostick*, 501 U.S. 429, 435-36, 111 S.Ct. 2382, 2387, 115 L.Ed.2d 389 (1991). The District Court concluded that Schlessinger was not free to leave. (Sum. Judg. p. 5 f.n. 2) The Seventh Circuit did not

mention that the case met this coercion test nor did it mention the case of *Florida v. Bostick* in its opinion.

The next factor of seizure test that the *Kernats* case discussed was the test in *California v. Hodari* stating that, " . . . [T]he citizen must actually yield to a show of authority from the police or be physically touched by the police." *Kernats* at 1178 citing *California v. Hodari D.*, 499 U.S. at 625-26, 111 S.Ct. 1550 (1991). The District Court's opinion stated that "[Officer Salimes] told Mr. Schlessinger to either pay the entire bill and leave immediately or he would immediately place Mr. Schlessinger in handcuffs and lock him up. . . . Mr. Schlessinger paid the bill and left." (Sum. Judg. p 5). The Seventh Circuit's opinion did not mention that Schlessinger did in fact yield to the police and thereby met this test, nor did it even mention the case of *California v. Hodari D.* in its opinion.

The third factor of seizure test that *Kernats* cited was *Cassidy v. Tackett* which states that "[C]oercive or intimidating police behavior tend to support a belief that compliance is compelled." *Kernats* at 1178 citing *Cassidy v. Tackett*, 938 F.2d 693, 696 (6th Cir. 1991). The District Court opinion stated that, "Officer Salimes essentially told Schlessinger to pay or be arrested. Viewing the facts in a light favorable to Mr. Schlessinger, a reasonable person could conclude that he was not free to leave; Officer Salimes had seized him." (Sum. Judg. p. 5 f.n. 2) The Seventh Circuit did not acknowledge that the District Court's opinion supported that compliance was compelled, thereby meeting this test, nor did it mention the case of *Cassidy v. Tackett* in its opinion.

The fourth factor of seizure test was originally from the *Kernats* case which stated that, "A threat becomes more coercive as the cost of non-compliance increases relative to the cost of non-compliance. . . . " *Kernats* at 1179. This test was met because the cost of compliance was to pay for the food bill, but the cost of noncompliance was to be immediately placed in handcuffs and locked up. (Sum. Judg. p. 3) The Seventh Circuit could not get over the fact that the case involved, "burnt steak," and suggested in the opinion that this case should have been brought in small claims court. (Ct. App. Op. p. 6) The Seventh Circuit failed to analyze the case facts by going through the cost of compliance versus cost of non-compliance test. The threat of an arrest for nonpayment was unreasonable. The Seventh Circuit's "small claims" comment both distracted and diverted attention away from the significance of the great discrepancy between being handcuffed and arrested versus paying the food bill.

The fifth factor of seizure test came originally from the *Kernats* case which cited that "In our view, a seizure typically involves an almost complete restriction of movement – either a laying of hands or a close connection (both temporally and spatially) between the show of authority and the compliance." *Kernats* at 1180. The District Court's decision stated that, "[Officer Salimes] told Mr. Schlessinger to either pay the entire bill and leave immediately or he would immediately place Mr. Schlessinger in handcuffs and lock him up for disorderly conduct and theft." (Sum. Judg. p. 6) The Seventh Circuit did not acknowledge that Schlessinger was both temporally and spatially restricted, thereby meeting this test.

As stated above, the District Court stated that Schlessinger was seized by Officer Salimes. Additionally, all of the tests for factors of seizure mentioned in the *Kernats* case were clearly met. The only test left to find that Officer Salimes is outside the scope of qualified immunity is whether the officer knew that the actions were unreasonable in light of the situation and in light of pre-existing law. *Kernats* cited *Lojuk v. Johnson* which stated that " . . . [W]e look first to case law on point or in closely analogous areas be it 'permits us to conclude that reasonably diligent government officials would have known of the case law, related it to the situation at hand, and molded their conduct accordingly.' " *Kernats* at 1176 citing *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir. 1985), *cert. denied*, 474 U.S. 1067 (1986). *Kernats* also cited to *Eberhardt v. O'Malley* which stated that " . . . [I]ndeed, one need not cite a case at all if the constitutional violation is obvious." *Kernats* at 1176 citing *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994).

Additionally, the Seventh Circuit is required under the Supreme Court case of *Elder v. Halloway*, 510 U.S. 510 (1994) to use its full knowledge of its own and consider all relevant precedents, whether or not cited by the district court, when reviewing this qualified immunity case. The case of *Jones by Jones v. Webb* further clarified the test to determine whether the officer's actions were unreasonable by stating that "Ultimately, we are concerned with 'whether the law is clear in relation to the specific facts confronting the [officer] when he acted.' " *Jones by Jones v. Webb*, 45 F.3d 178, 184 (7th Cir. 1995) citing *McDonald v. Haskins*, 966 F.2d at 294 (7th Cir. 1992) (quoting *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) (en banc), *cert. denied*,

488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988)). The Supreme Court case of *Anderson v. Creighton* stated that " . . . [The requirement of clearly established law] is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Lastly, the Supreme Court case of *Harlow v. Fitzgerald* stated that "[Q]ualified immunity would be defeated if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury. . . . ' " *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396 (1982) (emphasis original) (quoting *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975)).

Concerning whether the officer's actions were unreasonable is this case, the District Court had an entirely contrary view to the Seventh Circuit's opinion. The District Court stated that "Officer Salimes essentially told Schlessinger to pay or be arrested." (Sum. Judg. p. 5) The District Court's opinion indicate that avoiding arrest was contingent upon paying the food bill. This is a very important point since the contingency of paying the food bill will logically dismiss certain possibilities of pre-existing law to consider as reasonable. The contingency of paying the food bill would have to be an element of the pre-existing law in order to consider the officer's actions as reasonable.

The District Court stated that Schlessinger failed to establish that the seizure would have been unreasonable since Wisconsin Stat. § 943.21 provides that a person can be imprisoned for fraud on a restaurant keeper where that person, "[h]aving obtained any food . . . at any restaurant, intentionally absconds without paying for it." The contingency of not paying a food bill could logically be considered as an element of Wis. Stat. § 943.21. However, the facts that there was no secrecy concerning the complaint about the food, Schlessinger said he would pay for the food when he got the correct order, Schlessinger did not eat the food in dispute, and Schlessinger did not try to hid himself in any manner, do not support the contention that there was fraud or that anybody "intentionally absconded." This situation was essentially a consumer product complaint in which a police officer could not reasonably be used to collect the food bill. Therefore, the seizure was unreasonable under Wisconsin Stat. § 943.21.

The Seventh Circuit's opinion stated that there was no dispute that Schlessinger committed disorderly conduct, therefore Officer Salimes did not violate the constitution. (Ct. App. Op. p. 6) The Seventh Circuit did not acknowledge that the District Court did not even mention the possibility of disorderly conduct being reasonable in the circumstances. Upon closer analysis, Seventh Circuit would have found that disorderly conduct, the arrest threat contingent upon paying the food bill, could not be reasonable. The contingency of paying the food bill is not an element of disorderly conduct. Therefore, the threat of either – pay or be arrested for disorderly conduct – could not possibly be reasonable.

Additionally, there are existing laws that make it unreasonable and illegal to make a threat of arrest in order to collect money. Further, the Fair Debt Collection Practices Act, prohibits a threat of arrest in order to collect debt. Additionally, Wisconsin Stats. § 943.30(1) states that it is a felony to threaten another of an offense with the intent to compel the person so threatened to do any act against that person's will. These long standing laws make it clearly unreasonable for Officer Salimes to threaten arrest for disorderly conduct if Schlessinger did not pay his food bill.

The decision of the Seventh Circuit is erroneous for the following reasons: 1) the court's lack of analysis of the qualified immunity issue; 2) the lack of relevant precedent cited and discussed concerning qualified immunity; 3) failure to construe the case in the light most favorable to petitioner; 4) omissions, changes, and diminishments of important facts; and, 5) the above mentioned comments about the petitioner, his attorney, and their case. For these reasons, Petitioner believes that the Seventh Circuit's decision should be reversed and the case remanded in order that the claim of qualified immunity is analyzed in a fair and complete manner.

## II. The Seventh Circuit abused its discretion to sanction the case.

This case has merit and was made in good faith. As discussed in the above paragraphs, this case arguably meets every test required to find Officer Salimes outside the scope of qualified immunity. Additionally, case law does not support this case being sanctioned. "A frivolous

appeal means something more to us than an unsuccessful appeal." *Ruderer v. Fines*, 614 F.2d 1128, 1132 (1980) citing *N.L.R.B. v. Lucy Ellen Candy Division*, 517 F.2d 551, 555 (7th Cir. 1975). "Typically the courts have looked for some indication of the appellant's bad faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgement and for the purpose of delay or harassment, or out of sheer obstinacy." *Ruderer,* 614 F.2d 1128 at 1132 citing *Lucy Ellen Candy Division*, 517 F.2d at 555. Additionally, court of appeals have looked to see if appellant's claim is "totally devoid of any semblance of colorable merit." *Ruderer*, 614 F.2d 1128, 1132.

The Seventh Circuit cited the case of *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) in the order to sanction to support their decision to sanction. (Exhibit C) However, the *Mars Steel Corp.* decision does not support the sanction. *Mars Steel Corp.* states that "[D]iscretionary choices are not left to a court's 'inclination, but to its judgement; and its judgement is to be guided by sound legal principles.' " *Mars Steel Corp. v. Continental Bank N.A.*, at 938 citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280 (1975). The Seventh Circuit did not use their sound judgement concerning this sanction when they did not acknowledge that the District Court had already found that seizure had occurred in this case. All that was at issue by the time of the appeal was whether Officer Salime's threat to Schlessinger to pay for the food or be arrested was unreasonable. As described in detail in the above paragraphs, petitioner has both an analysis and existing law that supports his claims. For these reasons,

the case has merit and was made in good faith. Thus, Seventh Circuit abused its discretion when sanctioning Schlessinger and his attorney concerning the merit of this case.

## III. The Seventh Circuit became embroiled in the case and created a due process violation for the appeal and the sanctioning process.

The Seventh Circuit, by becoming embroiled in this case, denied due process in both the appeal and the sanction process. "At the heart of due process is the right to a fair hearing conducted by an impartial tribunal. Not only is a biased decision maker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." *Bakalis v. Golembeski*, 35 F.3d 318, 323 citing *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). To determine personal embroilment of a judge, the Supreme Court in the case of *Taylor v. Hayes* examined the record of the case to determine if there was a "mounting display of an unfavorable personal attitude toward petitioner, his ability, and his motives" *Taylor v. Hayes*, 418 U.S. 488, 501, 94 S.Ct. 2697, 41 L.Ed.2d 897, 909 (1974). Upon examination of the record, the Supreme Court quoted the following statements of the judge to support that the judge had become personally embroiled:

> I. "[the judge] said petitioner had put on 'the worst display' he had seen in many years at the bar – 'as far as a lawyer is concerned, you're not.' " *Taylor*, 418 U.S. at 502.
>
> ii. "Early in the trial [the judge] cautioned petitioner against 'putting on a show.' " *Id.*

iii. "[The judge] added that "if you give him an inch, he'll take a mile. I might as well sit on him now." *Id.*

Now, compare these statements with the statements of Petitioner's case:

I. "Schlessinger's lawyer (yes, he has one)" 4

ii. "But having played the wise guy in calling the police, Schlessinger encored that performance by filing this suit . . . " 2

iii. "This goofy lawsuit deservedly met an abrupt end in the district court." 2

iv. "The contention is nutty." 5

v. "a litigant may [not] snooze through a case" 5

vi. "true to form, Schlessinger's lawyer propounds a loopy thesis" 6

vii. "if your meal is not tasty, you do not throw a tantrum" 6

The statements contained in the court of appeals opinion for petitioner's case are of the same nature and tone as those quoted by the Supreme Court in *Taylor v. Hayes* as supporting the claim of personal embroilment of a judge .

In addition to the embroilment cases and examples, it is important to remember that the record was to be construed in the light most favorable to [the plaintiff appealing the qualified immunity claim]. *Simmons v. Pryor*, 26 F.3d 650, 653 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1833, 128 L.Ed.2d 461 (1994). Appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedent, not simply those cited to

or discovered by district court. *Elder v. Halloway*, 510 U.S. 510, 511, 114 S.Ct. 1019 (1994). A court of appeals reviewing a qualified immunity judgement should therefore use its full knowledge of its own and other relevant precedents. *Id.* at 511. Additionally, a court of appeals may not release defendants as being immune because of shortages in counsels' or the court's legal research or briefing. *Id.* at 511.

Based on the above mentioned cases and examples, it is clear that the Seventh Circuit opinion is biased on the face of the opinion because of the Seventh Circuit's choice of words and comments said about the petitioner, his attorney, and the claim. Additionally, the case was biased for the following reasons: 1) the court's lack of analysis of the qualified immunity issue; 2) the lack of relevant precedent cited and discussed concerning qualified immunity; 3) the court's failure to construe the case in the light most favorable to the petitioner; and, 4) omissions, changes, and diminishments of important facts. Because of the above reasons, due process was denied during both the appeal and the sanction process.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDREW J. SHAW
3145 North 124th Street
Brookfield, WI 53005
c/o (414) 781-2876
*Counsel of Record for Petitioner*

# APPENDIX

**EXHIBIT "A"**

**Seventh Circuit Court of Appeals Opinion**

**In the**

**United States Court of Appeals**

**for the Seventh Circuit**

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Nos. 96-1730 & 96-2606
DAVID M. SCHLESSINGER,

*Plaintiff-Appellant,*

*v.*

GEORGE SALIMES, *et al.*,

*Defendants-Appellees.*

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Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 95-C-1154 – **John W. Reynolds,** *Judge.*

ARGUED OCTOBER 28, 1996 –
DECIDED NOVEMBER 15, 1996

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Before POSNER, *Chief Judge,* and EASTERBROOK and RIPPLE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* David Schlessinger and two friends visited Anthony's Steakhouse in Geneva, Wisconsin, for dinner on January 8, 1994. Schlessinger ordered his steak medium-well done. Before the main course arrived, Schlessinger deemed that he was "receiving substandard service at the restaurant, so I demanded better service." Judging the meat he received "burned," Schlessinger complained long and loud. George Condos, the owner, told him that the food had been properly prepared and asked him to stop disturbing the other patrons. Schlessinger was unwilling to eat the food, to leave, or to pay until his demand for a new entree had

been met. Schlessinger's affidavit continues: "I feared trouble by the escalating situation and called the police [from my cellular phone] to get the situation corrected." George Salimes and another officer answered the call. Condos suggested to the officers that Schlessinger might be under the influence of drugs. Salimes told Schlessinger that, unless he paid the tab and left, he would be arrested for disorderly conduct and theft of services. The trio then paid and left.

Most people dissatisfied with a restaurant's service or cuisine would tell their friends not to go, resolve not to return themselves, and perhaps write a letter to the editor of the local newspaper or the Better Business Bureau, then let the matter drop. But having played the wise guy in calling the police, Schlessinger encored that performance by filing this suit against Condos, Salimes, and everyone else in or out of sight – including the Town of Geneva, the Town Board and its members, the Town's police department, and the Town's chief of police. According to the complaint, most of the defendants are liable under 42 U.S.C. §1983 for an unconstitutional seizure of his person – even though he walked out of the restaurant unhindered. Condos and the Restaurant were sued under the diversity jurisdiction on a variety of state-law theories. None of the claims reached first base. The district court dismissed those against Condos and the Restaurant after finding that Schlessinger could not obtain damages exceeding the jurisdictional minimum (then $50,000). The court granted summary judgment to Salimes on the ground of qualified immunity. Claims against the remaining defendants collapsed because Schlessinger neglected to inform the court how they

could be liable. He asserted that they were indifferent to his rights, but that is not enough for liability. After judgment, Schlessinger attempted to rectify the deficiency by a motion under Fed. R. Civ. P. 60(b)(6), which the district judge denied out of hand. Schlessinger has filed appeals from both the judgment and the order denying the Rule 60(b) motion.

This goofy lawsuit deservedly met an abrupt end in the district court. Frivolous at the outset, and likely maliciously retaliatory as well, the case has deteriorated on appeal. Consider for example the question whether the complaint satisfies the jurisdictional minimum amount in controversy. Plaintiffs receive the benefit of all doubt: a court may not dismiss the claim unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount". *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). Yet a plaintiff challenged to show that the recovery could exceed the requisite level cannot just appeal to the judge's druthers; he must show how the rules of law, applied to the facts of his case, could produce such an award. *Wellness Community® -National v. Wellness House*, 70 F.3d 46, 49-50 (7th Cir.1995). Schlessinger was not arrested, and the check for all three diners was only $100 (some of which doubtless represents drinks and appetizers, and therefore is not in controversy). He himself called the police, initiating the events of which he complains. He accuses Condos of slander for telling Salimes that Schlessinger might be high on drugs. We suppose that this statement is defamatory and shall assume not only that the complaint adequately alleges malice but also that Wisconsin authorizes punitive damages for statements to the police – although

it has a strong privilege (which Schlessinger does not discuss) for allegations of crime made to police for the purpose of initiating a bona fide investigation. *Otten v. Schutt*, 15 Wis.2d 497, 113 N.W.2d 152 (1962); *Joseph v. Baars*, 142 Wis. 390, 125 N.W. 913 (1910). Does Wisconsin authorize punitive awards as high as $50,000 in the absence of any concrete injury? Schlessinger did not cite in the district court a single case addressing that subject, or any other theory of damages.

On appeal, his indifference to Wisconsin's law persists. Now Schlessinger seeks to establish a $50,000 amount in controversy by attaching two newspaper articles to his brief. One, from the *Wall Street Journal*, observes that high jury verdicts have led to proposals for statutory caps; it has nothing to do with the rules Wisconsin uses to compute punitive damages in defamation cases. The other, from the *Washington Post*, begins: "A former cafeteria manager at the Smithsonian Institution's National Museum of American History was awarded $400,000 Monday in a human rights lawsuit after a jury heard testimony that his boss addressed him as an 'old fart.' " What this suit, dealing with a hostile working environment, has to do with accusations of crime in Wisconsin Schlessinger does not endeavor to explain. No argument based on Wisconsin law has been preserved, so this appeal was doomed. Because he took his cue from the newspapers rather than from the law books, Schlessinger's lawyer (yes, he has one) neglected to notice that many jury awards are trimmed as legally unjustified. Runaway juries occasionally return mammoth verdicts; this interesting social phenomenon does not effectively

abolish the jurisdictional minimum in diversity litigation, as Schlessinger seems to believe.

Next consider the claim against the Town, the Police Department, and their top officials. *Under Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), municipal bodies are not vicariously liable for the acts of their employees. They are liable only for their own policies, and Schlessinger has not tried to identify an unconstitutional policy that the Town or Police Department adopted. The claims against the members of the town board and chief of police are doubly vicarious. Even when a municipality is liable for an unconstitutional policy, this does not imply liability for the mayor; people are responsible for their own deeds, not for the deeds of their subordinates or employers. Schlessinger has never attempted to articulate a theory of liability for the chief of police, the chairman of the Town's board, and like defendants. Schlessinger contended only that inadequate training of the police amounted to deliberate indifference to his rights. His lawyer seems to be unaware that there is no general obligation to give public employees thorough training. *Collins v. Harker Heights*, 503 U.S. 115, 122-24 (1992); *Canton v. Harris*, 489 U.S. 378, 388 (1988). What the Town's unconstitutional "policy" might be remains a mystery.

Once again, things have gone downhill on appeal. Instead of addressing the reasons he lost, Schlessinger argues that a district court's order denying a motion under Rule 60(b)(6) should be reviewed de novo by the court of appeals. The contention is nutty. *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826 (7th Cir.1985). *Ornelas v. United States*, 116 S.Ct. 1657, (1996), the sole case on

which Schlessinger relies, concerns appellate review of probable-cause issues in criminal cases on direct appeal; it has nothing to do with post-judgment motions and does not imply that a litigant may snooze through a case and revive his claims under Rule 60(b)(6). Finality is an important goal in litigation, which *Ornelas* does not diminish. At all events, the contention is beside the point: by omitting any argument that the district court's decision in favor of these defendants was mistaken, Schlessinger has rendered the standard of review irrelevant.

As for the claim against Salimes: we may assume that an order by the police along the lines of "Do X or be taken into custody" requires the same sort of justification that custody itself requires – that is, depends on probable cause to believe that the person has committed a crime. We cannot find a case holding this, but the proposition is sensible for the same reason "your money or your life" is an objectionable demand. See *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir.1987). Schlessinger seeks to use this as the springboard to contend that refusing to pay for overdone food does not violate Wis. Stat. §943.21 and therefore cannot support an arrest. Cf. *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir.1985). Yet a suit under §1983 is not the right way to test the meaning of state law, as if the police violate the fourth amendment every time they err in interpreting a statute. Misapplication of state law does not violate the Constitution. *Archie v. Racine*, 847 F.2d 1211 (7th Cir.1988) (en banc). We used this principle in *Gordon v. Degelmann*, 29 F.3d 295 (7th Cir.1994), to hold that an arrest based on a mistaken view of state law does not thereby violate the fourth amendment. Suppose this is wrong; how would Schlessinger

prove his claim, when Salimes threatened arrest for *two* reasons: theft of services and disorderly conduct? There is no dispute about the elements of the latter offense, and on this record no dispute that Schlessinger committed it. Condos and Salimes describe Schlessinger as loud and obnoxious, disturbing the other patrons. Schlessinger's affidavit does not deny these characterizations of his conduct, so there is no material dispute and no impediment to summary judgment. Officer Salimes's threat to arrest Schlessinger therefore was proper – and it was also appropriate for Salimes to try to end the contretemps short of an arrest. Preserving the peace is an important function of the police, well served by his approach to the dispute.

Because Salimes did not violate the Constitution, we need not dwell on the immunity question – although it is worth noting that, true to form, Schlessinger's lawyer propounds a loopy thesis. He contends that "it is time to revisit the approach taken by the Court in earlier cases, and allow juries to decide the issues of fact relevant to claims of qualified immunity." Quite aside from the fact that Schlessinger's brief does not offer a coherent (indeed, any) argument for abandoning *Rakovich v. Wade*, 850 F.2d 1180, 1201-02 (7th Cir.1988) (en banc), there is the fact that judges have been told by the Supreme Court that, because immunity protects public officials from the burden of litigation, courts must resolve immunity defenses before trial, and when possible before discovery. See *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Schlessinger does not deign to discuss the decisions of the Supreme Court that undergird the cases he asks us to overrule.

Schlessinger's suit is absurd and likely malicious. It trivializes the constitutional rights he asks us to vindicate. If your meal is not tasty, you do not throw a tantrum, upset the other diners, and then sue the mayor of the town where the restaurant is located. Perhaps the dispute about the bill was meet for small-claims court in Wisconsin; it was nothing to make a federal case about. The appeal is even weaker than the original complaint. Suits and appeals such as this not only bring the courts into disrepute but also divert scarce judicial time from other litigants who have serious claims or defenses. We therefore direct Schlessinger and his attorney to show cause, within 14 days, why they should not be penalized under Fed. R. App. P. 38 and Circuit Rule 38 for pursuing a frivolous appeal.

AFFIRMED; ORDER TO SHOW CAUSE ISSUED

A true Copy:
Teste:

_____

*Clerk of the United States*
*Court of Appeals for*
*the Seventh Circuit*

**EXHIBIT "B"**

**December 23, 1996 Sanction Order**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 23, 1996.

Before

**Hon.** RICHARD A. POSNER, Chief Judge

**Hon.** FRANK H. EASTERBROOK, Circuit Judge

**Hon.** KENNETH F. RIPPLE, Circuit Judge

| | | |
|---|---|---|
| DAVID M. SCHLESSINGER, *Plaintiff-Appellant,* | ) | Appeal from the United States District Court for the Eastern District of Wisconsin. |
| **Nos.** 96-1730 & 96-2606 | ) | |
| **v.** | ) | No. 94-C-1154 |
| GEORGE SALIMES, *et al.*, *Defendants-Appellees.* | ) | John W. Reynolds, *Judge.* |

**Order**

Our opinion in this case concluded with an order giving Schlessinger and his attorney 14 days to show cause why they should not be penalized under Fed. R. App. P. 38 and Circuit Rule 38 for pursuing frivolous appeals. The responses have been received.

Substantially for the reasons given in our opinion, we now conclude that the appeals are indeed frivolous. Our opinion identified numerous deficiencies in the approach to this appeal – for example, asking us to send immunity questions to juries, without mentioning the decisions of the Supreme Court that require us to do otherwise, and arguing for a novel standard of appellate review while

omitting any argument on the merits of the municipal-liability question. The responses plaintiff and his attorney have filed disregard these problems and attempt to reargue the facts of the encounter at the restaurant. But we did not issue the order because we had a particular view of the facts; the order was based on unreasoned, even irresponsible, legal contentions that took a small-claims matter away from state court and brought it to a United States Court of Appeals, at substantial and unwarranted expense to the defendants and the judicial system. The responses do not allay our concerns about the conduct of this case. The appeals had no chance of success, and therefore were frivolous and sanctionable. *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (en banc).

As a sanction for these frivolous appeals, we direct Schlessinger and his lawyer to reimburse defendants for the legal expenses reasonably incurred in defending the appeals. Schlessinger and his lawyer, Andrew J. Shaw, are jointly and severally liable for payment. Appellees have 14 days to file statements of the expenses reasonably incurred; Schlessinger and Shaw will have 7 days to file any objections to these statements, after which we will enter an appropriate order.

**EXHIBIT "C"**

**February 4, 1997 Order**

**UNITED STATES COURT OF APPEALS**
*For the Seventh Circuit*
*Chicago, Illinois 60604*

February 4, 1997

*By the Court:*

| | |
|---|---|
| DAVID M. SCHLESSINGER,<br>Plaintiff-Appellant,<br>Nos. 96-1730 and 96-2606 v.<br>GEORGE SALIMES, TOWN OF GENEVA, TOWN OF GENEVA POLICE DEPARTMENT, TOWN OF GENEVA BOARD, RICHARD PLOCH, Chairperson of the Board, RICHARD BEHOF, Member of the Board, KENNETH PIANTINO, Member of the Board, EDWARD GRITZNER, GEORGE CONDOS, ANTHONY'S STEAKHOUSE, INC., Individually, Jointly and Severally,<br>Defendants-Appellees | Appeals from the United States District Court for the Eastern District of Wisconsin.<br>No. 94 C 1154<br>John W. Reynolds, Judge. |

The following is before the court:

1. **AFFIDAVIT OF KATHRYN M. WEST DOCUMENTING REASONABLE LEGAL EXPENSES INCURRED IN DEFENDING THE APPEALS,** filed January 6, 1997, by counsel for George

Salimes, Town of Geneva Police Department and Edward Gritzner.

2. **AFFIDAVIT IN SUPPORT OF COSTS SANCTION,** filed January 9, 1997, by counsel for George Condos and Anthony's Steakhouse, Inc..

3. **AFFIDAVIT IN SUPPORT OF COSTS SANCTION,** filed January 6, 1997, by counsel for the Town of Geneva, Town of Geneva Board, Richard Ploch, Richard Behof, and Kenneth Piantino.

4. **AFFIDAVIT OF ANDREW J. SHAW IN RESPONSE TO THE LEGAL FEES INCURRED BY DEFENDANT-APPELLEES/REQUEST A BREAKDOWN OF LEGAL HOURS,** filed January 14, 1997, by counsel for the appellant.

Pursuant to the court's December 23, 1996 order, **IT IS ORDERED** that sanctions are assessed against plaintiff David M. Schlessinger and his attorney Andrew J. Shaw as follows:

1. To defendants George Salimes, Town of Geneva Police Department and Edward Gritzner, $8320.80;

2. to defendants George Condos and Anthony's Steakhouse, Inc., $2951.75; and

3. to defendants Town of Geneva, Town of Geneva Board, Richard Ploch, Richard Behof, and Kenneth Piantino, $4810.19.

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**EXHIBIT "D"**

**District Court's Summary Judgment Decision**

Copy mailed to attorneys for parties by the Court pursuant to Fed. R. Civ. P.77(d). 2-23-96

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN**

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DAVID M. SCHLESSINGER,

Plaintiff,

v.

Civil Action No. 94-C-1154

GEORGE SALIMES; TOWN OF GENEVA; TOWN OF GENEVA BOARD; RICHARD PLOCH, Chairperson of the Board; RICHARD BEHOF, Member of the Board; KENNETH PIANTINO, Member of the Board; TOWN OF GENEVA POLICE DEPARTMENT; EDWARD GRITZNER; GEORGE CONDOS; and ANTHONY'S STEAKHOUSE, INC.,

Individually, Jointly and Severally,

Defendants.

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**DECISION AND ORDER GRANTING SUMMARY JUDGMENT**

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## BACKGROUND

David Schlessinger is suing Town of Geneva police officer George Salimes ("Officer Salimes"), the Town of Geneva, the Town of Geneva Board, the Town of Geneva

Police Department, and several members of those respective entities (collectively, the "Town of Geneva defendants"), under 42 U.S.C. § 1983. Mr. Schlessinger alleges that Officer Salimes violated Mr. Schlessinger's constitutional rights when he made Mr. Schlessinger pay – under threat of arrest – for a meal that he did not eat. Mr. Schlessinger has also filed state law claims of false imprisonment and negligence against Officer Salimes, and defamation charges against Anthony's Steakhouse and its chef, George Condos. On July 3, 1995, Officer Salimes and the Town of Geneva defendants filed a motion for summary judgment arguing that plaintiff failed to state a claim and that they are entitled to qualified immunity. The court holds that defendant Salimes and the Town of Geneva defendants are entitled to qualified immunity and that the pending state law claims against the Town of Geneva defendants will not stand. The motion for summary judgment is granted.

## FACTS

On January 8, 1994, Mr. Schlessinger and two friends went to Anthony's Steakhouse in the Town of Geneva. They all ordered steaks done medium well but were dissatisfied with the way the steaks were prepared. Mr. Schlessinger alleges that the steaks were burned, butterflied (sliced in half), and not prepared according to his and his friends requests. Although his friends said they were willing to eat the steaks, Schlessinger refused. He asked the waitress for new steaks and then asked to speak to the manager because he felt the waitress was rude. The owner came, examined the steaks, and said there was nothing wrong with them. They argued. The

owner told Schlessinger that if he did not pay for the steaks and leave, he would call the police. Mr. Schlessinger called the police himself from his cellular phone. While Schlessinger was waiting in the lobby, George Condos, the chef, told him that when the police arrived, they would arrest him.

Two Town of Geneva officers, including George Salimes, arrived at the restaurant. Officer Salimes and the owner exchanged familiarities. Mr. Condos told the police that the plaintiff was probably high on drugs and was refusing to pay for food he ate. Mr. Condos also told Officer Salimes that he should search Schlessinger for drugs and take him to jail. Schlessinger told Officer Salimes that he was not happy with the steak, that he had not touched it, and that he had asked the restaurant to prepare another one but that they refused. He also told Officer Salimes that the chef and the owner were abusive and referred to him as a drug user. Finally, he told Officer Salimes that he would pay for his dinner when he got his proper order.

Officer Salimes refused to go and look at the food. He told Mr. Schlessinger to either pay the entire bill and leave immediately or he would immediately place Mr. Schlessinger in handcuffs and lock him up for disorderly conduct and theft. Mr. Schlessinger paid the bill and left.

Mr. Schlessinger alleges that after he left the restaurant he was followed by a white squad car. He believes that it was a Town of Geneva squad intentionally harassing him.

Mr. Schlessinger alleges that he was coerced into paying for the food despite the fact that he had not eaten

it. He felt he would be restrained and jailed, and that he felt mentally coerced by his belief that Officer Salimes was serious about his threat of arrest.

Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331, 1332 and 1343(a)(3). Venue is proper pursuant to 28 U.S.C. § 1391(b).

## SUMMARY JUDGMENT STANDARD

The court must grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions, and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of asserting the absence of any dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To withstand summary judgment, however, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Even if some facts are in dispute, entry of summary judgment is in order if the movant either establishes uncontroverted facts entitling it to summary judgment or demonstrates that the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23. The court must draw all reasonable inferences from the record in favor of the nonmoving party. *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv.*, 40 F.3d 146, 150 (7th Cir. 1994).

## ANALYSIS

Mr. Schlessinger alleges a violation of his constitutional rights actionable under 42 U.S.C. § 1983. This requires him to demonstrate that the defendants acted under color of state law and their actions deprived plaintiff of rights, privileges, or immunities guaranteed by the Constitution. *Webb v. City of Chester, Illinois*, 813 F.2d 824, 828 (7th Cir. 1987). The Town of Geneva defendants have raised the affirmative defense of qualified immunity. Qualified immunity shields governmental officials from liability as long as their actions do not violate clearly established constitutional rights "of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The defense is a "substantial barrier" for plaintiffs. *Kernats v. O'Sullivan*, 35 F.3d 1171, 1177 (7th Cir. 1994).

Mr. Schlessinger failed to show that Officer Salimes' actions were clearly established as unlawful at the time they occurred. When a defense of qualified immunity is plead, the plaintiff has the burden of showing 1) that the facts establish a constitutional violation and 2) that the wrongfulness of defendant's conduct was clearly established law at the time the acts occurred. *Id.* at 1176. Thus, it is not sufficient that a violation occurred, but a plaintiff must provide the court with case law which would have put a reasonable person on notice that defendant's actions were unlawful at that time.[1] *Id.*

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[1] It is not necessary to cite a case law where the constitutional violation is obvious. *Kernats v. O'Sullivan* 35 F.3d 1171, 1176 (7th Cir. 1994).

Although Officer Salimes may have seized Mr. Schlessinger, it is not clear that the seizure was unlawful.[2] A seizure is unlawful where it is unreasonable. Mr. Schlessinger fails to establish that arresting him would have been unreasonable. Wisconsin law provides that a person can be imprisoned for fraud on a restaurant keeper where that person, "[h]aving obtained any food . . . at any- . . . restaurant, intentionally absconds without paying for it." Wis. Stat. § 943.21. Mr. Schlessinger said he would not pay for his meal. Although contrary to the maxim that "the customer is always right," the language of the statute could be interpreted to find Schlessinger obtained his food and intended to leave without paying. Subsequent case law provides no guidance. Thus, although the court questions whether an arrest for fraud would have been lawful, Officer Salimes' threat of arrest could have been reasonable under § 943.21.

Even assuming *arguendo* that there was an unlawful seizure, Mr. Schlessinger has failed to meet his burden of providing the court with any law to that effect. While it is not necessary to provide a case that is on all fours with the case before the court, a plaintiff must point the court to case law providing "particularized facts and concrete legal principles" to show the state of the law at the time

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[2] A seizure occurs where "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544 (1980). Officer Salimes essentially told Schlessinger to pay or be arrested. Viewing the facts in a light favorable to Mr. Schlessinger, a reasonable person could conclude that he was not free to leave; Officer Salimes had seized him.

of the defendant's actions. *Kernats*, 35 F.3d at 1176. Schlessinger cites to several cases in his briefs, but they all stand for general principles of search and seizure law. None of them provide any factual basis to show that Officer Salimes' conduct was unlawful. Therefore, the court will grant defendants' motion for summary judgment on the § 1983 claims. Now the court must consider the state law claims against the Town of Geneva defendants.

**State Law Claims**

With the dismissal of the § 1983 claims, jurisdiction over the state law claims is is [sic] solely based on diversity of citizenship. To maintain jurisdiction the amount in controversy must exceed $50,000. 28 U.S.C. § 1332(a). No reasonable jury could find that Mr. Schlessinger's damages exceeded $50,000. Thus, Mr. Schlessinger's state law claims are dismissed for lack of jurisdiction.

For the above reasons, the court **GRANTS** defendants' motion for summary judgment and the case is dismissed.

**SO ORDERED** this 23 day of February, 1996.

**/s/ John W. Reynolds**
**John W. Reynolds**
**United States District Judge**

**EXHIBIT "E"**

**Affidavit to Show that appeal was Made in Good Faith and Should Not be Penalized**

**(Exhibit "A" of this affidavit is the district court's summary Judgment decision which is found in Exhibit "D" of this petition.)**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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DAVID M. SCHLESSINGER,
PLAINTIFF-APPELLANT,

v.

Consolidated Appeal Nos:
96-1730 and 96-2606

GEORGE SALIMES; TOWN OF GENEVA; TOWN OF GENEVA BOARD; RICHARD PLOCH, Chairperson of the Board; RICHARD BEHOF, Member of the Board; KENNETH PIANTINO, Member of the Board; TOWN OF GENEVA POLICE DEPARTMENT; EDWARD GRITZNER; GEORGE CONDOS; ANTHONY'S STEAKHOUSE INCORPORATED,
Individually, Jointly
and Severally,
DEFENDANTS-APPELLEES.

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AFFIDAVIT OF ANDREW J. SHAW IN RESPONSE TO THE COURT OF APPEALS FOR WHY THE APPEAL SHOULD NOT BE PENALIZED UNDER FED. R. APP. P. 38 AND CIRCUIT RULE 38.

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State of Wisconsin )
) ss.
County of Waukesha )

Andrew J. Shaw, being first duly sworn on oath, deposes and states as follows:

1. I am the attorney for Mr. David M. Schlessinger for his appeal work to challenge the qualified immunity

and my office is located at 3145 North 124th Street, Brookfield, Wisconsin 53005.

2. I make this affidavit on personal knowledge and offer it in response to the order of the Court of Appeals for why the appeal brought by Mr. Schlessinger should not be penalized under Fed. R. App. P. 38 and Circuit Rule 38 for pursuing a frivolous appeal.

3. On or about March 9, 1996, I met with Mr. David Schlessinger and Attorney Thomas M. Barrett, the attorney who initiated the law suit and referred this case to me after the case got dismissed on a summary judgement motion. This case was dismissed on a summary judgement motion on the issue of qualified immunity and the remaining state claims dismissed on jurisdiction prior to my participation.

4. On November 22, 1996, I notified Attorney Thomas M. Barrett of the appeal decision and gave him a copy of the decision because the Court of Appeals stated in the decision that this case was "frivolous at the outset." Attorney Thomas M. Barrett is the attorney who initiated the case and referred the case to me after the dismissal of the case in district court.

5. After discussing with the previous attorney and with Mr. Schlessinger, and after reviewing the summary judgement decision by Judge Reynolds, I agreed to appeal the summary judgement decision. I brought this appeal as a good faith attempt to challenge the qualified immunity in the summary judgement motion. I believe that the conduct by Officer Salimes in this contextual setting went beyond his qualified immunity as a police officer.

6. It is my belief that qualified immunity as a matter of law should not be granted in the consumer contextual setting where a customer is unhappy about the product as well as the service. I do not believe the officer's conduct of threatening arrest should be used as a collection agency. This conduct of threatening arrest in this setting should not be protected under the qualified immunity doctrine because it is not objectively reasonable under the law. Further, the Fair Debt Collection Practices Act prohibits a threat of arrest in order to collect debt.

7. I have read over the decision written by Judge Easterbrook in this case and respectfully suggest that his finding of fact in his decision goes beyond the facts presented by Judge Reynold's decision for granting the summary judgement. Without going into the kind words suggested by Judge Easterbrook, this appeal is a review of a summary judgement, where the district court held that Officer Salimes and the Town of Geneva defendants are entitled to qualified immunity and that the pending state law claims against the Town of Geneva defendants will not stand.

8. I believe that the district court erred when it granted the summary judgement for the defendants. The self-serving affidavits as claimed by the defendants are inherently wrong because the conduct of the officer is objectively unreasonable. Given the contextual setting, a reasonable officer would not threaten an arrest in order for a consumer to pay for a product and service of which he is dissatisfied.

9. I have reviewed this case as more than a "burnt steak" case. The fact that the case involves the threat of

handcuffing and the threat of arrest over one burnt steak actually increases the likelihood that Officer Salimes went beyond the scope of qualified immunity. The 7th Circuit Court of Appeals case of *Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994) on page 1179 states the following:

> "A threat becomes more coercive as the cost of noncompliance increases relative to the cost of compliance; thus it is reasonable to expect that a citizen's decision whether to comply with an official command would by informed by both the rock and the hard place."

According to this case law, the fact of this case being a "burnt steak" case is not at all trivial. As the case law suggests, the fact of the burnt steak as the reason for Officer Salimes to threaten immediate handcuffing and immediate arrest clearly demonstrates the unreasonability of the officer, shows coercion and creates a compelling context for which to find that Officer Salimes was acting outside the scope of his qualified immunity.

10. I respectively disagree with the Court of Appeals decision written by Judge Easterbrook. I believe that qualified immunity did not apply in this case. To me, it is quite clear that the facts found by the district court are not the same facts relayed in the Court of Appeals' decision. In particular, examine the quoted portions of the summary judgement decision:

> a. "The owner told Schlessinger that if he did not pay for the steaks and leave, he would call the police. Mr. Schlessinger called the police himself from the cellular phone. While Schlessinger was waiting in the lobby, George

Condos, the chef, told him that when the police arrived, they would arrest him."

b. "Officer Salimes and the owner exchanged familiarities. Mr. Condos told the police that the plaintiff was probably high on drugs and was refusing to pay for the food he ate. Mr. Condos also told Officer Salimes that he should search Schlessinger for drugs and take him to jail."

c. "Schlessinger told Officer Salimes that he was not happy with the steak, that he had not touched it, and that he had asked the restaurant to prepare another one but that they refused. He also told Officer Salimes that the chef and the owner were abusive and referred to him as a drug user. Finally, he told Officer Salimes that he would pay for his dinner when he got his proper order."

d. "Officer Salimes refused to go and look at the food. He told Mr. Schlessinger to either pay the entire bill or leave immediately or he would immediately place Mr. Schlessinger in handcuffs and lock him up for disorderly conduct and theft. Mr. Schlessinger paid the bill and left."

See the true and correct copy of Judge Reynolds' summary judgement decision marked as Exhibit "A."

11. In comparison to the facts stated in Judge Reynolds' summary judgement decision, it is unclear why critical facts required by case law to show that a police officer is outside the scope of qualified immunity were omitted from the Court of Appeals' decision and why other facts found by the Court of Appeals are clearly contrary to the fact portion of the summary judgement decision:

**a. "Judging the meat he perceived "burned," Schlessinger complained long and loud."** There is no place in the summary judgement fact portion that states that Schlessinger complained "long and loud." In fact, the summary judgement fact portion determined that both Mr. Schlessinger and Mr. Condos argued together and does not distinguish Mr. Schlessinger's conduct from Mr. Condos' conduct with regard to the argument. It is adversarial that Mr. Condos' and Officer Salimes affidavits emphasized Mr. Schlessinger's conduct while diminishing their own conduct. However, the district court did not find the facts concerning disorderly conduct to be so one-sided as these affidavits suggest. The district court in its fact portion did not label nor did it suggest that any part of Mr. Schlessinger's comments constituted disorderly conduct. In fact one part of the fact portion suggests patience and orderly conduct when it is stated that Mr. Schlessinger waited in the lobby.

**b."Condos suggested to the officers that Schlessinger might be under the influence of drugs."** The summary judgement fact portion states that Mr. Condos "told" the police that the plaintiff was probably high on drugs. The word "suggested" in the Court of Appeals' decision changes the facts from how they were stated in the summary judgement. The word "suggested" incorrectly diminishes Mr. Condos' verbal actions concerning drug taking to be merely suggestions while the summary judgment use of the word "told" insinuates that Mr. Condos' verbal actions concerning drug taking were intentional statements.

c. **"Salimes told Schlessinger that, unless he paid the tab and left, he would be arrested for disorderly conduct and theft of services."** The summary judgement fact portion include facts about the immediacy of the threat of arrest and the threat of Officer Salimes to place Mr. Schlessinger in handcuffs, which are critical factors in considering whether an officer went beyond his qualified immunity. The case of *Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994) on page 1180 states that there must be a showing of an "immediate threat [of arrest] made by persons physically present who are ready and able to carry them out, leaving no room for appeal evasion, or compromise" in order to find unconstitutional seizure. The threat of handcuffs in order to get payment of a steak is important to show that the Officer Salimes was not objectively reasonable in settling the dispute about the quality of the steak. These critical fact are omitted from the appeal decision.

d. **"The trio then paid and left."** The summary judgement fact portion also includes that Mr. Schlessinger felt that he was coerced into paying for the food despite the fact that he had not eaten it and that he felt that he would be restrained and jailed, and that he felt mentally coerced by his belief that Officer Salimes was serious about his threat of arrest. The facts stated in the fact portion of the summary judgement concerning Mr. Schlessinger's belief that he was mentally coerced and that Officer Salimes was serious about his threat of arrest are critical factors in determining whether Officer Salimes was outside the scope of qualified immunity. The case of *Kernats v. O'Sullivan*, on

page 1177, stated that the district court dismissed a seizure claim because the plaintiffs made no allegation that they did not feel free to leave the presence of the Officer. The factor of Mr. Schlessinger's feelings of coercion are integral to the case of determining that Officer Salimes was outside the scope of his qualified immunity. These critical facts are omitted from the appeal decision.

**e. "He himself called the police, initiating the events of which he complains."** The summary judgement fact portion stated that the owner told Schlessinger that if he did not pay for the steaks and leave, he would call the police and Mr. Schlessinger then called the police himself from his cellular phone. While Schlessinger was waiting in the lobby, George Condos, the chef, told him that when the police arrived, they would arrest him. Then Mr. Condos told Officer Salimes that he should search Schlessinger for drugs and take him to jail. Afterwards, the Officer Salimes then told Mr. Schlessinger to either pay the entire bill and leave immediately or he would immediately place Mr. Schlessinger in handcuffs and lock him up for disorderly conduct and theft. There are no facts to support that Mr. Schlessinger had any part in thinking up the accusations of Mr. Condos and the threats of Officer Salimes. The facts in the summary judgement support that Mr. Condos and Officer Salimes initiated the events of which Mr. Schlessinger complains.

12. The differences in the facts as shown by the Court of Appeals and the District Court clearly establish that material facts are in dispute such that the district

judge dismissed this case on qualified immunity and not because of the material facts.

13. Because the summary judgement motion dismissed the case on the issue of qualified immunity, I was prepared for the oral argument on the issue of qualified immunity.

14. In further review of the fact portion of the summary judgement decision, I believe that had Salimes not been a police officer that he would have violated Wis. Stats. §943.30(1). The Wis. Stats. §943.30(1) provides that "whoever, either verbally . . . maliciously threatens to accuse or accuses another of any crime or offense . . . with the intent to compel the person so threatened to do any act against the person's will is guilty of a Class D felony." The facts as quoted from the summary judgement decision and quoted in paragraph 11(d) of this affidavit show that Officer Salimes was not objectively reasonable and was therefore not within the scope of qualified immunity. See the true and correct copy of Wis. Stats. §943.30(1) marked as Exhibit "B".

15. In further review of the fact portion of the summary judgement decision, I believe that the owner, Mr. Condos, as the facts are described from the summary judgement and quoted in paragraph 11(a) of this affidavit, of Mr. Condos telling Schlessinger that when the police arrived that they would arrest him, would also fall within Wis. Stat. §943.30.

16. I believe that the fact portion of the summary judgement decision do not support that there was disorderly conduct. As stated upon in paragraph 11(a) of this

affidavit, there are actually facts in the summary judgment to support patient and orderly conduct as demonstrated by Mr. Schlessinger waiting in the lobby instead of creating commotion.

17. With regard to the amount in dispute, I believe that the amount in dispute is in excess of $50,000, exclusive of interest and costs. The Court of Appeals states the following regarding the question of whether this case has any chance of having an amount in dispute that meets diversity jurisdiction requirements:

> "Now Schlessinger seeks to establish a $50,000 amount in controversy by attaching two newspaper articles to his brief. One, from the *Wall Street Journal* observes that high jury verdicts have led to proposals for statutory caps; it has nothing to do with the rules Wisconsin uses to compute punitive damages in defamation cases. The other from the *Washington Post*, begins: "A former cafeteria manager at the Smithsonian Institution's National Museum of American History was awarded $400,000 Monday in a human rights lawsuit after a jury heard testimony that his boss addressed him as an "old fart"." What this suit, dealing with a hostile working environment, has to do with accusations of crime in Wisconsin Schlessinger does not endeavor to explain. No argument based on Wisconsin law has been preserved, so this appeal was doomed. Because he took his cue from the newspapers rather than from the law books, Schlessinger's lawyer (yes, he has one) neglected to notice that many jury awards are trimmed as legally unjustified. Runaway juries occasionally return

> mammoth verdicts; this interesting social phenomenon does not effectively abolish the jurisdictional minimum in diversity litigation, as Schlessinger seems to believe."

First of all, the standard for the issue of the amount in dispute has been brought to the Court of Appeals' attention by defendant George Condos in their appeal brief: "If plaintiff's claim is apparently made in good faith, the sum claimed determines whether the amount in controversy requirement has been satisfied." *Vance v. Vandercook Co.*, 170 U.S. 468 (1898). Thus if there is good faith by the Plaintiff, then the controversy amount has been satisfied. I truly believe and have sworn by this affidavit that this claim is brought in good faith. This good faith is enough to satisfy the amount in controversy issue.

Secondly, the articles attached to the brief were attached primarily for demonstrating that juries often award more than judges believe should be awarded, thus demonstrating to courts that they feel that the amount in controversy was very high. The fact that some of these high awards are trimmed down does not change the fact that some cases with high awards are never trimmed. The fact that the articles were not of the same claim is of no consequence because there are many kinds of cases in which juries award high amounts. The amount that juries award logically depends upon the specific facts of the case, not upon the type of the case since most jury members are probably not well versed upon which types of cases should be granted high awards. In addition, Wisconsin jury members are probably not well versed concerning how Wisconsin jury awards rank in comparison

to other states. I believe that the fact that there were no Wisconsin cases cited showing specific awards is irrelevant since all that is needed is a showing of good faith. As explained, I believe that this does not "doom" the appeal.

Thirdly, I believe that newspapers are acceptable by the legal field to demonstrate a point in legal writing of all types, as evidenced by the instructions concerning how to cite newspapers in The Blue Book, which is the authority of acceptable citations. I believe that the fact that the Court of Appeals does not appear to agree with the substance of the articles does not make citing the articles wrong or improper.

Fourthly, the fact that Defendant Condos argued that the settlement offer of the previous attorney was only $1,500 does not prove in any way that Mr. Schlessinger or his previous attorney viewed their case as being worth this amount. Settlements as a rule are often much lower than what parties view their case to be worth. In addition, there is really no way of finding cases that discuss discrepancies between amounts in controversy and settlement offers since it is rare and extremely inappropriate for any for any party, including Defendant Condos, to reveal information concerning settlement offers. In any case, the low settlement amount suggests that the case was based on principle and was not in any way malicious or vindictive.

Lastly, I believe that the fact that the Court of Appeals affirmed the district court, thereby giving no award to Plaintiff has no bearing on the issue of whether the amount in controversy was met in this case since the

issue here is whether the jury *could* have awarded $50,000, exclusive of interests and costs, not whether the jury actually did award this amount. I in good faith believe that a jury, if ever having the chance to hear the full facts after discovery, would award a very high amount for the actions of Officer Salimes in threatening to handcuff and immediately arrest a restaurant consumer if he did not pay for the food of which he disputed the quality and did not eat.

18. In conclusion, I in good faith respectfully but firmly state to the Court of Appeals that I have believed in the merits of this case from the unset of my work on this case. In my law practice, I routinely turn down cases from potential clients who do not have claims I believe in or have cases that I believe would better be worked out in some form of alternative dispute resolution. I would be happy to provide the Court of Appeals of a list of types of cases I have turned down if the Court so requests. I offer this list because I am not ashamed the merits of any case that I have brought, including the present case.

I am truly shocked and attorneys who know me well are equally shocked that the Court of Appeals suggests that I might be bringing a case in bad faith. At least one half of my clientele pay reduced legal rates. As evidenced by my income throughout the years, the profession of law has never been a personal quest to get rich. It has always been about helping people in need of justice.

19. I hope that the Court of Appeals may look past its choice of words and read this affidavit with an open mind. In the book, *Civil Rights Litigation and Attorney Fees*

*Annual Handbook*, Volume 11, page 20-3, written by Members of the National Lawyers Guild Civil Liberties Committee, Professor George Cochran states the following about credibility of a meritorious civil rights case versus a civil rights case that is sanctioned:

> "Sanction is an inherently lawless area. Subjective factors that are always in play can lead to situations where – assuming a decision to "get" counsel – no amount of lawyering skills can deter a result-orientated court. Thus, an attorney who finds herself with the wrong case before the wrong court at the wrong time always be on guard."

I respectfully request that the Court of Appeals put all personal opinions concerning this case aside and carefully and objectively examine what is said in this affidavit. Upon examination of facts and analysis of this affidavit, the Court will find that sanctions are not warranted for this case.

Dated this 27th day of November, 1996.

/s/ Andrew J. Shaw
Andrew J. Shaw
State Bar No. 01018100
3145 N. 124th Street
Brookfield, WI 53005
414 790-1020

Subscribed and sworn to before me
this 27th day of November, 1996.

/s/ Kathryn G. Bantum
Notary Public, State of Wisconsin
My Commission expires on 4-19-98.

**EXHIBIT "F"**

**Affidavit in Response to the Legal Fees Incurred by Defendant-Appellees/Request a Breakdown of Legal Hours**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
NO 96-1720 & 96-2606

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DAVID M. SCHLESSINGER,

Plaintiff-Appellant,

vs.

GEORGE SALIMES, TOWN OF GENEVA, TOWN OF GENEVA BOARD, RICHARD PLOCH, Chairperson of the Board, RICHARD BEHOF, Member of the Board, KENNETH PIANTINO, Member of the Board, TOWN OF GENEVA POLICE DEPARTMENT, EDWARD GRITZNER, GEORGE CONDOS, ANTHONY'S STEAKHOUSE, INC., Individually, Jointly and Severally,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin

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AFFIDAVIT OF ANDREW J. SHAW IN RESPONSE TO THE LEGAL FEES INCURRED BY DEFENDANT-APPELLEES/REQUEST A BREAKDOWN OF LEGAL HOURS

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STATE OF WISCONSIN )
) ss.
WAUKESHA COUNTY )

ANDREW J. SHAW, being first duly sworn, upon his oath deposes and states as follows:

1. Pursuant to the order dated December 23, 1996, I make the following objection to the legal fees incurred by defendant-appellees:

2. Affiant represented David Schlessinger for his appeal only, and affiant was not the attorney who initiated the lawsuit.

3. Affiant does not object to the hourly rate charged by defendant-appellees' attorneys.

4. Affiant request the breakdown of legal hours to the tenth of an hour as to the legal service provided because the hours listed by the attorneys for the defendants are aggregated. Affiant is unable to determine whether the hours listed are duplicated or unreasonable.

5. Affiant respectfully request copies of all the billings from the start of law suit to the present. Affiant will be able better determine the reasonableness of the legal fees charged for the defense of the appeal.

6. Affiant has not received the statement of expenses and legal fees from the Law Firm of Mohr & Anderson, but again, affiant requests breakdown of legal fees to the tenth of an hour and copies of billings from the start of the suit to the appeal.

7. Affiant believes that a fee of $2500.00 as been reasonable for the legal fees for each defendant for the appeal. Affiant believes that the attorneys for the defendants could have gotten together and written a joint brief.

8. Affiant in good faith still disagree with the decision of the Court of Appeals and respectfully asks the Court of Appeals on its own- motion to reconsider the sanction.

9. Nevertheless, affiant respectfully request a payment plan for the order based upon percentage of gross income because this affiant does not have the funds.

Dated this 13th day of January, 1997.

/s/ Andrew J. Shaw
Andrew J. Shaw
State Bar No. 01018100

Subscribed and sworn to before me
this 13th day of January, 1997.

/s/ Kathryn G. Bantum
Notary Public, State of Wisconsin
My Commission: exp 4-19-98

No. 96-1688

Supreme Court, U.S.
FILED
MAY 22 1997
CLERK

In The

# Supreme Court of the United States

October Term, 1996

DAVID M. SCHLESSINGER,

*Petitioner,*

*vs.*

GEORGE SALIMES, TOWN OF GENEVA, TOWN OF GENEVA BOARD, RICHARD PLOCH, Chairperson of the Board, RICHARD BEHOF, Member of the Board, KENNETH PIANTINO, Member of the Board, TOWN OF GENEVA POLICE DEPARTMENT, EDWARD GRITZNER, GEORGE CONDOS, ANTHONY'S STEAKHOUSE INC.,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL J. CIESLEWICZ
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& SWIETLIK, S.C.
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## QUESTIONS PRESENTED

1. Was it reasonable for Officer Salimes to threaten to arrest David Schlessinger for "fraud on an innkeeper" or disorderly conduct when Schlessinger refused to pay for a meal he ordered and partially consumed, and his loud, obnoxious behavior disturbed other patrons of the restaurant?

2. Did the Seventh Circuit Court of Appeals properly exercise its discretion when it sanctioned David Schlessinger and his attorney pursuant to Fed. R. App. P. 38 and Seventh Circuit Rule 38, where the Seventh Circuit found that Schlessinger failed to cite relevant controlling case law; attempted to reargue facts on appeal; made unreasonable and irresponsible legal contentions; pursued an appeal at substantial and unwarranted costs to the respondents and the judicial system; and pursued an appeal which had no chance of success?

## LIST OF INTERESTED PARTIES

The petitioner is David M. Schlessinger.

The respondents are correctly identified in the caption. Charles H. Bohl of Whyte Hirschboeck Dudek S.C. is counsel of record for all respondents. Charles H. Bohl and Kathryn M. West of Whyte Hirschboeck Dudek S.C. are counsel for respondents George Salimes, Town of Geneva Police Department and Edward Gritzner. Michael J. Cieslewicz and John K. Garofani of Kasdorf, Lewis & Swietlik, S.C. are counsel for respondents Town of Geneva, Town of Geneva Board, Richard Ploch, Richard Behof and Kenneth Piantino. Mary Beth Castino of Mohr & Anderson, S.C. is counsel for respondents George Condos and Anthony's Steakhouse.

Anthony's Steakhouse is a Wisconsin corporation. It has no parent company or subsidiaries.

Each of the respondents join in this Brief in Opposition.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| List of Interested Parties | ii |
| Table of Contents | iii |
| Table of Citations | iv |
| Statement of the Case | 1 |
| A. Procedural History | 2 |
| B. Factual Background | 3 |
| Reasons for Denying the Writ | 4 |
| I. The Seventh Circuit Court Of Appeals Properly Affirmed The District Court's Judgment Of Dismissal On Alternative Grounds. | 5 |
| II. Schlessinger's Actions Gave Officer Salimes Probable Cause To Arrest Him. | 6 |
| III. The Seventh Circuit Properly Exercised Its Discretion When It Sanctioned Schlessinger And His Counsel. | 12 |
| IV. Petitioner's Claims Of Embroilment And Lack Of Due Process Are Not Only Meritless, But Frivolous, Warranting The Imposition Of Sanctions. | 16 |
| Conclusion | 19 |

*Contents*

*Page*

## TABLE OF CITATIONS

**Cases Cited:**

*Anderson v. Creighton*, 483 U.S. 635 (1987) ..... 10

*Bacon v. American Federation of State Employees Council 13*, 795 F.2d 33 (7th Cir. 1986) ..... 16

*Bailey v. Bicknell Minerals, Inc.*, 819 F.2d 690 (7th Cir. 1987) ..... 14

*Bennett v. Spear*, __ U.S. __, 117 S. Ct. 1154 (1997) ..... 5

*Brady v. Chemical Constr. Corp.*, 740 F.2d 195 (2d Cir. 1984) ..... 13

*Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987) ..... 16

*Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1 (1987) ..... 12, 13

*Chalfy v. Turoff*, 804 F.2d 20 (2d Cir. 1986) ..... 13

*Des Vignes v. Department of Transportation*, 791 F.2d 141 (Fed. Cir.), *cert. denied*, 479 U.S. 853 (1986) ..... 14

*Elder v. Holloway*, 510 U.S. 510 (1994) ..... 6

*Contents*


| | Page |
|---|---|
| *Hambler v. County of Los Angeles*, 803 F.2d 462 (9th Cir. 1986) | 13 |
| *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) | 10, 14 |
| *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986) | 13 |
| *Hilgeford v. People's Bank*, 776 F.2d 176 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986) | 13 |
| *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987) | 12, 15 |
| *Hunter v. Bryant*, 502 U.S. 224 (1991) | 14 |
| *In re Grand Jury Proceedings*, 787 F.2d 778 (1st Cir. 1986) | 13 |
| *In re Hendrix*, 987 F.2d 195 (7th Cir. 1993) | 13 |
| *In re Perry*, 918 F.2d 931 (Fed. Cir. 1990) | 16 |
| *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64 (1st Cir.), *cert. denied*, 469 U.S. 1018 (1984) | 16 |
| *LaAmiga del Pueblo, Inc. v. Robles*, 937 F.2d 689 (1st Cir. 1991) | 14 |
| *Malley v. Briggs*, 475 U.S. 335 (1986) | 11 |

*Contents*

*Page*

*Mars Steel Corporation v. Continental Bank, N.A.*, 880 F.2d 928 (7th Cir. 1989) ..... 13

*McGoldrick Oil Co. v. Campbell, Athey & Zukowski*, 793 F.2d 649 (5th Cir. 1986) ..... 13

*Rakovich v. Wade*, 850 F.2d 1180 (7th Cir. 1988) .... 14

*Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) ..... 17

*Ruderer v. Fines*, 614 F.2d 1128 (7th Cir. 1980) ..... 12

*Salve Regina College v. Russell*, 499 U.S. 225 (1991) ..... 5

*Smith v. Blue Cross & Blue Shield*, 959 F.2d 655 (7th Cir. 1992) ..... 13

*State v. Croy*, 145 N.W. 2d 118 (Wis. 1966) ..... 9

*Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59 (3d Cir. 1986) ..... 16

*Taylor v. Hayes*, 418 U.S. 488 (1974) ..... 17

*Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066 (1st Cir. 1990) ..... 14

*Tyson v. Jones & Laughlin Steel Corp.*, 958 F.2d 746 (7th Cir. 1992) ..... 13

*Contents*

*Page*

*United States v. Williams*, 504 U.S. 36 (1992) ..... 8

**Statutes Cited:**

42 U.S.C. § 1983 ..... 2, 10

Wis. Stat. § 943.21 .....8, 9, 10, 11

Wis. Stat. § 943.21(2)(b) ..... 9

**Rules Cited:**

Federal Rule of Appellate Procedure 38 . i, 12, 15, 16, 17, 18

Federal Rule of Appellate Procedure 60(b) ..... 2

Supreme Court Rule 42(2.) ..... 19

Supreme Court Rule 43(7.) ..... 19

I

Respondents' request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Seventh Circuit. The Court of Appeals opinion is reported at 100 F.3d 519 (1996). For the Court's convenience, all citations to the opinion will be to the opinion identified as Exhibit A in Schlessinger's Appendix to the Petition. The opinion of the United States District Court for the Eastern District of Wisconsin is not reported. For the Court's convenience, any citation to the District Court's opinion will be to the opinion identified as Exhibit D in Schlessinger's Appendix.

## STATEMENT OF THE CASE

Schlessinger has identified the basis for his Petition as involving the issues of qualified immunity and the Seventh Circuit's decision that his appeal was frivolous and sanctionable. With respect to the qualified immunity issue, Schlessinger does not contend that the issues raised in the Petition are novel or involve unsettled questions of federal law. Rather, he harangues the Seventh Circuit for failing to consider "all relevant precedents" and disagrees with its determination of the facts. Throughout his argument, Schlessinger fails to recognize the simple precept that absent a constitutional violation, an analysis of qualified immunity is needless. Quite clearly, Schlessinger fails to acknowledge the dispositive finding of the Court that the threat of arrest was appropriate and no constitutional injury occurred.

Regarding the Seventh Circuit's determination that this appeal was frivolous, in a rather odd argument given the factual background of this case, Schlessinger contends that the panel of jurists were "personally embroiled" in the controversy and reached a biased decision. Despite Schlessinger's characterizations, this Petition represents nothing more than Schlessinger's continued refusal to acknowledge the factual and legal inadequacies of his complaint.

**A. Procedural History**

On October 14, 1994, Schlessinger filed suit in the United States District Court for the Eastern District of Wisconsin. Generically alleging a Section 1983 violation of his constitutional rights and a state law claim for defamation, Schlessinger sued the Town of Geneva, the Town Board, members of the Board, the Geneva Police Department, Officer George Salimes, Edward Gritzner, Anthony's Steakhouse and its owner.

In June of 1995, the Police Department respondents moved for summary judgment. In deciding the Department's motion, the District Court ruled that Schlessinger failed to establish that the threat of arrest, the very basis of his constitutional claim, was unreasonable. (A. 17). With dismissal of the Section 1983 claim, the court further concluded that Schlessinger's state law claims required dismissal as "no reasonable jury" could find that Schlessinger's damages exceeded the requisite jurisdictional amount of $50,000.00. (A. 19).

In March of 1996, Schlessinger filed his notice of appeal of the District Court's decision with the Seventh Circuit Court of Appeals. Simultaneously, Schlessinger filed a Rule 60(b) motion for reconsideration in the District Court. On May 29, 1996, the District Court denied the motion to reconsider and on June 26, 1996 he filed a notice of appeal of the District Court's order. Schlessinger's appeals were consolidated by order dated July 10, 1996.

Following oral arguments, the Seventh Circuit affirmed the decision of the District Court. (A. 1). In its opinion dated November 15, 1996, the court concluded that Schlessinger's suit "trivialized the constitutional rights he asks us to vindicate." (A. 8). Specifically, the court determined that Schlessinger did not sustain his burden of proof with respect to the jurisdictional

amount in controversy requirement (A. 3-5); and had failed to establish a violation of his constitutional rights by the Geneva Police Department. (A. 5-7). Determining the appeal was "even weaker" than the original complaint (A. 8), the court directed Schlessinger and his attorney to show cause why they should not be penalized for pursing a frivolous appeal. (A. 8).

Following its review of materials submitted by Schlessinger and his attorney (A. 20-33), the Seventh Circuit concluded that the responses filed ignored the numerous legal deficiencies in the appeal and constituted nothing more than an attempt to reargue the factual basis for the underlying complaint. (A. 10). Determining the appeal had no chance of success, the Seventh Circuit ordered Schlessinger and his attorney to reimburse the respondents for the legal expenses associated with the appeal. (A. 10).

On February 13, 1997, Schlessinger attempted to file his Petition for Writ of Certiorari. On February 18, 1997, the Office of the Clerk notified Schlessinger of numerous deficiencies with the Petition and gave Schlessinger 60 days to comply with the Rules of the Supreme Court. Schlessinger's Petition was docketed on April 22, 1997.

**B. Factual Background**

Respondents agree that Schlessinger has correctly set forth the facts as determined by the District Court when deciding summary judgment. However, Schlessinger has omitted facts relied on by the Seventh Circuit in its *de novo* review of this matter.

With respect to the January 8, 1994 incident, the Seventh Circuit determined that Officer Salimes threatened arrest on alternative grounds; theft of services and disorderly conduct.

(A. 7). The court also concluded that given the uncontested evidence that Schlessinger was loud and obnoxious and disturbing other patrons, there was no dispute that Schlessinger was in fact disorderly. (A. 7).

As to the potential liability of the municipal defendants, the court noted that Schlessinger did not even try to identify an unconstitutional policy, practice or procedure purportedly adopted by the Town or the Police Department. (A. 5). Similarly, the court found Schlessinger never attempted to articulate a theory of liability against the Chief of Police or Board Chairman. (A. 5).

Regarding the amount in controversy issue, the Seventh Circuit observed that Schlessinger endeavored to meet his burden of proof by attaching two newspaper articles to his brief. (A. 4). The court identified the articles as discussing statutory damage caps and a plaintiff's recovery in an employment related suit. The court correctly determined that neither article was remotely probative to the issues in this case. (A. 4).

## REASONS FOR DENYING THE WRIT

This civil rights lawsuit was filed against George Salimes ("Officer Salimes"), and others by petitioner David Schlessinger ("Schlessinger"), because Schlessinger believed that he should not have been asked to pay for a steak he ordered in a restaurant. Schlessinger seeks review of the lower court's determination that Officer Salimes was entitled to qualified immunity, but focuses almost entirely on the Seventh Circuit Court of Appeals' alleged erroneous failure to address the lower court's holding, and ignores the alternative ground upon which the Seventh Circuit affirmed judgment for Salimes (and the others). Schlessinger also asks this Court to review the Seventh Circuit's imposition of sanctions on Schlessinger (and his attorney) for

proceeding with a frivolous appeal. Neither of these issues provides a compelling basis for the Court to exercise its discretion to grant the Petition for Certiorari, particularly as Schlessinger's request is based upon a misapprehension of procedural principles and the substantive law. Furthermore, the analysis contemplated by Schlessinger would be fact intensive and the Court's decision would have little application outside the confines of this case. Finally, the decisions of both the Court of Appeals and the District Court turned on questions of state law, the review of which will not support a grant of certiorari.

## I.

## THE SEVENTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S JUDGMENT OF DISMISSAL ON ALTERNATIVE GROUNDS.

Holding that the undisputed facts demonstrated that Officer Salimes did not violate Schlessinger's constitutional rights, the Seventh Circuit declined to address the question of whether the doctrine of qualified immunity was implicated. The Seventh Circuit concluded that because Schlessinger could have been arrested for disorderly conduct, "Officer Salimes' threat to arrest Schlessinger . . . was proper." (A. 7). Where an appellant may defend a judgment on any ground supported by the record, it is axiomatic that the court on appeal may affirm on those alternative grounds. *See Bennett v. Spear*, __ U.S. __, 117 S. Ct. 1154, 1163 (1997). Schlessinger correctly notes that the standard for review of summary judgment is *de novo* (Pet. 11), thereby lending further support to the Seventh Circuit's discretionary decision to evaluate the record and affirm the judgment on the legal grounds *it* deemed appropriate. The district court's conclusions of law are not binding on the circuit court, and the appellate court owes no deference to the trial court's conclusions. *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

Schlessinger's invocation of *Elder v. Holloway*, 510 U.S. 510 (1994), for the proposition that the Seventh Circuit was *required* to address the issue of qualified immunity, is inapposite. In *Elder*, the Court held that "[a] court engaging in review of a qualified immunity judgment should . . . use its 'full knowledge of its own [and other relevant] precedents.' " 510 U.S. at 516 (citation omitted). In the current case, the Seventh Circuit explicitly declined to "dwell on the immunity question." (A. 7). Contrary to Schellinger's suggestion, *Elder* simply does not require the Court to independently seek and review all cases related to qualified immunity if it does not engage in a qualified immunity analysis. Rather, once the court decides that a particular constitutional issue is implicated, cases bearing on an official's entitlement to qualified immunity can, and must be, considered as they come to the attention of the court — whether raised by the parties or not. In the present case, the Seventh Circuit's conclusion that Schlessinger's rights had not been violated renders any analysis regarding qualified immunity unnecessary. Thus, no such duty arises.

## II.

## SCHLESSINGER'S ACTIONS GAVE OFFICER SALIMES PROBABLE CAUSE TO ARREST HIM.

### A.

Summoned to the restaurant by Schlessinger himself, Officer Salimes was confronted with allegations that Schlessinger's loud, obnoxious behavior was disturbing patrons of the restaurant; Officer Salimes observed the same upon his arrival. (A. 7). Schlessinger never disputed that characterization of his behavior. (A. 7).

Under the circumstances, the Seventh Circuit correctly

concluded that irrespective of probable cause to arrest for theft of services (*i.e.*, fraud on an innkeeper), Schlessinger could have been arrested for disorderly conduct. (A. 7). Section 947.01, Wisconsin Statutes, provides:

> Disorderly conduct. Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

Schlessinger's actions provided probable cause for arrest under those provisions. Under the circumstances, Officer Salimes' threat to arrest him was perfectly appropriate. Schlessinger's claim that he was threatened with arrest "where there [was] not a violation of the law" (Pet. at i), is simply not borne out by the undisputed facts.

**B.**

Significantly, Schlessinger's refusal to pay for the food he (and his buddies) ordered and partially consumed (A. 15), gave Officer Salimes probable cause under state law to arrest Schlessinger for fraud on an innkeeper. Amazingly, Schlessinger attempts to package and sell this case to the Court as a "consumer dispute[ ] regarding products and services." (Pet. 9). Certainly Schlessinger was a "consumer" of products and services, so are shoplifters. Indeed, Schlessinger's implicit concession that he did "consume" products which he then refused to pay for is *prima facie* evidence that he violated the law. Officer Salimes' threat to arrest Schlessinger for reported and perceived actions which violate criminal statutes does not render Officer Salimes' actions unconstitutional, and certainly does not warrant review by this Court.

1.

Schlessinger continues to attempt to raise an argument he waived by failing to assert it in the context of the summary judgment proceedings before the District Court, suggesting that Wis. Stat. § 943.21 (the fraud on an innkeeper statute), is inapplicable, because "there was no secrecy" in his actions. (Pet. 19).

The Court has long held that in order to be reviewable on appeal, a claim or issue must have been "pressed or passed upon below." *United States v. Williams,* 504 U.S. 36, 40 (1992). Where Schlessinger never raised this argument in the context of the summary judgment proceedings, he waived it.

2.

Even if the Court would entertain Schlessinger's belated argument, the relevant statute supports the actions taken by Officer Salimes. There is simply no requirement that a customer be acting with "secrecy" before he may be deemed to have committed fraud on an innkeeper. Refusal to pay for food ordered will give rise to charge of fraud on an innkeeper. Section 943.21 of the Wisconsin Statutes provides:

> 943.21 Fraud on hotel or restaurant keeper.
>
> (1) Whoever does either of the following may be penalized as provided in sub. (3):
>
> (a) Having obtained any beverage, food, lodging or other service or accommodation at any campground, hotel, motel, boarding or lodging

> house, or restaurant, intentionally absconds without paying for it.[1]

The statute further provides that refusal to pay for the check when presented is *prima facie* evidence of intent to defraud. Section 943.21(2)(b) provides:

> (2) Under this section, prima facie evidence of an intent to defraud is shown by:
>
> * * *
>
> (b) The failure or refusal of any guest at a . . . restaurant, to pay, upon written demand, the established charge for any beverage, food,

---

1. The Wisconsin Supreme Court defined "absconding" in *State v. Croy*, 145 N.W. 2d 118 (Wis. 1966), quoting from the 1953 report of the Wisconsin Legislative Council as follows:

> Under this section the actor must abscond without paying for the food, lodging or other service. "Abscond" means to depart clandestinely. (Webster's New International Dictionary (2d ed.)). *In the context of this section a person absconds if he departs without the knowledge or consent of the operator of the hotel, motel, boarding house, or restaurant. . . .*

145 N.W. 2d at 120 (emphasis supplied).

Although *Croy* happened to involve absconding through clandestine means, the court never limited the definition to such a factual situation and even contemplated a broader interpretation of Wis. Stat. § 943.21. The legislative council expressly defined "absconding" in the context of § 943.21 to alternatively encompass a person departing *without the consent* of the innkeeper, as well as one departing without the innkeeper's knowledge. *Id.*

> lodging or other service . . . actually rendered.

Schlessinger actually received the food at issue. He may not have been satisfied with the steak, but it actually was served to him. Moreover, he had no complaint about the beverages and appetizers he received. (A. 3). Schlessinger was presented with a check for food and beverages which he refused to pay. He also refused to allow his friends to eat or pay for their dinners, which they found acceptable. (A. 14). On this basis alone, Officer Salimes had probable cause to arrest Schlessinger under Wis. Stat. § 943.21.

As the District Court found, Schlessinger did not prove that Officer Salimes would have been unreasonable in arresting Schlessinger under the facts presented most favorably to petitioner. (A. 18). It cannot be said that Officer Salimes' conduct was wrongful under clearly established law. Indeed, to this day, Schlessinger can provide no legal support whatsoever for his theory that Officer Salimes' threat to arrest him was unreasonable under the circumstances. (Pet. 20). In the absence of such proof, the police department respondents are entitled to qualified immunity.

The doctrine of qualified immunity shields government officials, including law enforcement officers, from liability for civil damages in actions brought pursuant to 42 U.S.C. § 1983 where their conduct does not violate *clearly* established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Its purpose is to give such officials the ability to predict when their actions will create liability for them, and provide them with assurance that they "will not be held personally liable as long as their actions are reasonable in light of current American law." *Anderson v. Creighton,* 483 U.S. 635, 646 (1987). This doctrine

is specifically intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

Here, Officer Salimes' actions were eminently reasonable. His actions certainly did not reflect either incompetence or a violation of any clearly-established law. He simply effectively defused an apparently heated situation in a public restaurant. By Schlessinger's own admission, the "situation" was "escalating." (A. 2). He was disturbing other patrons. (A. 1, 7). The police officers, called to settle a dispute by an angry and disruptive individual, were trying to keep the peace and avoid arresting Schlessinger.

Finally, Schlessinger's claims that Officer Salimes is not entitled to qualified immunity is fatally flawed and belied by his own actions in asking the Seventh Circuit to certify a question regarding the meaning of that statute to the Wisconsin Supreme Court. Specifically, he wondered whether the presumption of an "intent to abscond by failure to pay a bill when due is a valid provision in the overall statutory scheme, or whether it should be stricken." (Appellant Br. at 24-26).

Any review of the constitutionality of Wis. Stat. § 943.21, would have no impact on Officer Salimes' entitlement to qualified immunity. The question regarding immunity is whether, at the time of the Officer Salimes' actions, they violated a clearly established constitutional right. A finding that the statute is unconstitutional after the fact has no bearing on the reasonableness of their actions at the time of the incident, and therefore has no bearing on the issues presented in this case.

## III.

## THE SEVENTH CIRCUIT PROPERLY EXERCISED ITS DISCRETION WHEN IT SANCTIONED SCHLESSINGER AND HIS COUNSEL.

Schlessinger challenges the Seventh Circuit Court of Appeals' authority and ability to impose sanctions in this matter. His rather obtuse argument appears to rest on the following bases: (1) the Seventh Circuit did not decide the qualified immunity issue correctly; (2) case law does not support sanctions as his appeal was not made in bad faith; (3) the Seventh Circuit did not "use their sound judgment" and any judgment exercised was not based on sound legal principles. Schlessinger's bootstrapped argument, and indeed his entire Petition, is not only without merit, but textbook frivolous as well. This Court should deny this Petition, and, like the Seventh Circuit, find further sanctions appropriate for Schlessinger and Schlessinger's counsel for continuing to pursue this meaningless and maliciously-prosecuted action.

A court of appeals is entitled to impose sanctions, including reasonable damages and costs, in the event it determines an appeal is frivolous. Fed. R. App. P. 38. The court has authority to impose sanctions *sua sponte. Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987).

Rule 38 has three purposes: (1) to penalize the appellant who takes a frivolous appeal; (2) to compensate the injured party for delay and expense of the appeal, *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987); and (3) to deter future frivolous appeals, *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987); *Ruderer v. Fines*, 614 F.2d 1128 (7th Cir. 1980).

Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals. *Burlington Northern*, 480 U.S. at 8. While the accepted baseline standard for frivolousness is met when the result is obvious, or the arguments are wholly without merit, *Mars Steel Corporation v. Continental Bank, N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (citing numerous Seventh Circuit cases); *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986), courts have also found sanctions appropriate in the following circumstances:

(1) the briefs or arguments attempt to address the issues, but:

(a) cite no legal authority, *Hilgeford v. People's Bank*, 776 F.2d 176 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986); *In re Grand Jury Proceedings*, 787 F.2d 778 (1st Cir. 1986);

(b) cite only irrelevant or inapplicable authority, *Chalfy v. Turoff*, 804 F.2d 20 (2d Cir. 1986); *Brady v. Chemical Constr. Corp.*, 740 F.2d 195 (2d Cir. 1984);

(c) make unsubstantiated factual assertions or bare legal conclusions, *Hambler v. County of Los Angeles*, 803 F.2d 462 (9th Cir. 1986); *McGoldrick Oil Co. v. Campbell, Athey & Zukowski*, 793 F.2d 649 (5th Cir. 1986);

(2) the appellant fails to distinguish or even mention relevant precedent, *Smith v. Blue Cross & Blue Shield*, 959 F.2d 655 (7th Cir. 1992); *Tyson v. Jones & Laughlin Steel Corp.*, 958 F.2d 756 (7th Cir. 1992), or fails to make an argument for a change in the law, *In re Hendrix*, 987 F.2d 195 (7th Cir. 1993);

(3) the appellant asserts that dispositive authority was

wrongly decided, *Des Vignes v. Department of Transportation*, 791 F.2d 142 (Fed. Cir.), *cert. denied*, 479 U.S. 853 (1986);

(4) The appellant asserts issues not raised in the trial court and therefore not preserved for appeal, *Bailey v. Bicknell Minerals, Inc.*, 819 F.2d 690 (7th Cir. 1987); *see also La Amiga del Pueblo, Inc. v. Robles*, 937 F.2d 689 (1st Cir. 1991); *Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066 (1st Cir. 1990).

Schlessinger's Seventh Circuit appeal and even the present Petition, satisfy most of these "frivolous criteria."

First, the Court of Appeals followed correct procedure and properly affirmed the dismissal on the qualified immunity issue. Initially, the court concluded that summary judgment was warranted as Schlessinger failed to meet his burden to demonstrate a constitutional violation, a prerequisite to breaching the qualified immunity defense. (A. 6-7). Next, the court rejected Schlessinger's demand to send immunity questions to juries, which demand was based solely on unsubstantiated, bald legal conclusions devoid of any mention or discussion or dispositive Seventh Circuit decisions, including *Rakovich v. Wade*, 850 F.2d 1180, 1201-02 (7th Cir. 1988) (en banc), and this Court's decisions, including *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); and *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). (A. 6-7, 9). Petitioner's argument implicitly attacked the validity of this dispositive case law without any cogent argument for a change in that law. (A. 7).

Second, Schlessinger sued numerous defendants, but failed to inform the courts below how those defendants could be liable. (A. 2-3). Regarding Officer Salimes, Schlessinger failed to demonstrate to the District Court on summary judgment either

(1) that his seizure, if one existed, was unreasonable and therefore unlawful, or (2) that any case law illustrated that Officer Salimes' conduct was unlawful. (A. 18-19). Regarding the other defendants, such as the town board and the town chairman, Schlessinger asserted they were indifferent to his rights; yet, the Court of Appeals held that such indifference did not create liability. (A. 3). Clearly, his claims against those defendants were wholly without merit and doomed from the start. Similarly, Schlessinger never articulated a theory of liability for the police chief, the town board chairman, and the other like defendants. (A. 5). "What the Town's unconstitutional 'policy' might be remains a mystery." (A. 5). Again, Schlessinger simply drew bare, unsubstantiated legal conclusions of legal liability, without any supporting case law.

Third, on summary judgment, Petitioner failed to sustain his burden of proof regarding the minimum amount in controversy for diversity jurisdiction, resulting in dismissal of all of his remaining state law claims. (A. 3-4, 19). The Seventh Circuit noted that Petitioner "did not cite in the district court a single case addressing that subject, or any other theory of damages." (A. 4). Moreover, on appeal, the Seventh Circuit noted that Petitioner failed to preserve the issue for appeal and rejected his attempt to establish the jurisdictional minimum amount via newspaper articles, as opposed to Wisconsin case law on damages. (A. 4). "No argument based on Wisconsin law has been preserved, so this appeal was doomed." (A. 4).

Additionally, Schlessinger erroneously and frivolously claims that this Court should grant this Petition and reverse the sanctions order because this case was brought in good faith. Together with other circuits, the Seventh Circuit has expressly rejected the notion that good faith, or conversely, the lack of bad faith, protects an appellant from Rule 38 sanctions. *See Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987)

(proof of misconduct provides an additional basis for sanctions under Rule 38, but is not a prerequisite); *Bacon v. American Federation of State Employees Council 13,* 795 F.2d 33 (7th Cir. 1986) (no need for Court of Appeals to determine whether appellant thought appeal could succeed); *see also In re Perry,* 918 F.2d 931 (Fed. Cir. 1990) (good faith, but unreasonable, beliefs, and favorable reputation of attorney were irrelevant to the sanctions determination); *Braley v. Campbell,* 832 F.2d 1504 (10th Cir. 1987) (express rejection of appellant's contention that subjective bad faith was standard for Rule 38 sanctions); *Sun Ship, Inc. v. Matson Navigation Co.,* 785 F.2d 59, 64 (3d Cir. 1986) (Rule 38 focuses on the merits of the appeal regardless of good or bad faith); *Johnson v. Allyn & Bacon, Inc.,* 731 F.2d 64 (1st Cir.), *cert. denied,* 469 U.S. 1018 (1984) (court may award costs and fees even if appeal was not taken in subjective bad faith).

Schlessinger's self-serving statement that the appeal was undertaken in good faith does not shield him or his attorney from sanctions under Rule 38. The only recognized analysis is whether or not the appeal is objectively frivolous. Petitioner and his attorney should know, based upon a cursory review of the law, that this good faith argument is without merit. Once again, Petitioner and his attorney advance loopy, unsubstantiated legal arguments, which fly in the face of controlling precedent.

## IV.

## PETITIONER'S CLAIMS OF EMBROILMENT AND LACK OF DUE PROCESS ARE NOT ONLY MERITLESS, BUT FRIVOLOUS, WARRANTING THE IMPOSITION OF SANCTIONS.

Schlessinger and his counsel not only continue to clog the federal court system with this meritless litigation, but they also

advance new, frivolous arguments — this time aimed at the Seventh Circuit. Schlessinger claims that not only did the Seventh Circuit become "embroiled" in this litigation, but that it also deprived him of due process during the appeal and sanctions process. (Pet. 22-24).

Schlessinger's claim of embroilment is not only inaccurate, but is a halfbaked personal attack on the Seventh Circuit Court of Appeals. Again, Petitioner blatantly ignores and fails to develop dispositive case law. Petitioner fails to note that in *Taylor v. Hayes*, 418 U.S. 488 (1974), this Court was concerned with the embroilment of a trial court judge whose negative bias towards the petitioner was demonstrated in the presence of the jury during a murder trial. Those jury concerns are not present in an appeal.

Clearly, the Seventh Circuit dealt with Petitioner's appeal in a manner which did not mince words. Its opinion showed the court's disgust with this frivolous overdone litigation. In fact, petitioner's assertion is ludicrous in that he would apparently accede to the sanctions so long as the Seventh Circuit "spanked" him with nice, kind words. A Court of Appeals, however, is not so shackled in its role as guardian over its docket. While the court's opinion undoubtedly hurt Schlesinger's feelings, the court's frank analysis of this appeal does not render the court's decision a violation of due process. If anything, it sends a strong straightforward message to appellants who equate an appeal of right with a right to appeal anything.

Schlessinger's claim of due process violation with respect to the sanctions process is also frivolous and simply without merit. The Seventh Circuit may award sanctions for a frivolous appeal after notice from the court and reasonable opportunity to respond. Fed. R. App. P. 38. Such notice corresponds to the basic principles of notice and opportunity to be heard. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980).

In this case, due process is satisfied as Schlessinger was clearly given notice of the impending sanctions and an opportunity to respond. The Seventh Circuit required Petitioner and his attorney to show cause, within 14 days, why they should not be sanctioned under Fed. R. App. P. 38 and Circuit Rule 38 for pursuing a frivolous appeal. (A. 8). Subsequently, Petitioner's counsel filed an affidavit in response to the order to show cause. (A. 20-33). The Seventh Circuit thereafter issued an order which concluded that the appeal was indeed frivolous and which directed respondents to file statements of expenses reasonably incurred. (A. 9-10). Respondents submitted affidavits from their respective counsel, to which Petitioner's counsel filed an affidavit seeking a breakdown of "legal hours." (A. 34-36). Upon review of the affidavits filed, the Seventh Circuit issued its order imposing sanctions against Petitioner and his attorney Andrew J. Shaw. Petitioner received all the process he was due.

## CONCLUSION

The writ of certiorari should be denied. Additionally, the respondents respectfully request that this Court impose sanctions on Petitioner, pursuant to Supreme Court Rule 42(2.), and double costs, pursuant to Supreme Court Rule 43(7.).

Respectfully submitted,

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No. 96-1688

In The

# Supreme Court of the United States

October Term, 1996

DAVID M. SCHLESSINGER,

*Petitioner,*

v.

GEORGE SALIMES, TOWN OF GENEVA, TOWN OF GENEVA BOARD, RICHARD PLOCH, Chairperson of the Board, RICHARD BEHOF, Member of the Board, KENNETH PIANTINO, Member of the Board, TOWN OF GENEVA POLICE DEPARTMENT, EDWARD GRITZNER, GEORGE CONDOS, ANTHONY'S STEAKHOUSE INC., Individually, Jointly, and Severally,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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# TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

I. Introduction ..... 1

II. *De novo* review still requires the Seventh Circuit to stay within case facts and relevant case law ..... 2

III. The contextual setting of the case proves that Mr. Schlessinger was not disorderly ... 3

IV. Facts in the case do not support Fraud on the Innkeeper Statute, Wis. Stat. § 943.21 ..... 4

V. Qualified immunity appeal had merit because the District Court ruled that officer Salimes had seized Mr. Schlessinger within the meaning of the Fourth Amendment ... 5

VI. The Supreme Court defined the legal term "embroilment" and use of "embroilment" is not a personal attack on the Seventh Circuit ..... 6

VII. Due Process requires more than the mere technicalities of notice and chance to respond ..... 7

VIII. Why the Supreme Court should grant the petition ..... 8

## TABLE OF AUTHORITIES

Page

CASES

*Bakalis v. Golembeski*, 35 F.3d 318 (7th Cir. 1994) ....6, 7

*Elder v. Halloway*, 510 U.S. 510, 114 S.Ct. 1019 (1994) ..... 2

*Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994) ..... 2

*Simmons v. Pryor*, 26 F.3d 650 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1833, 128 L.Ed.2d 461 (1994) ..... 2

STATUTES

Wis. Stats. § 943.21 ..... 4

PERIODICALS

Alexander Wohl, *Paper Trailblazer*, 83 A.B.A. J., 68, 72 (April 1997) .....9, 10

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

## ARGUMENT

### Introduction

In response to Respondents' Brief in Opposition, Petitioner reaffirms and incorporates the Petition for a Writ of Certiorari in its entirety. The Petition explains in detail how the facts of this case meet the tests required by case law to show that the police officer is outside the scope of qualified immunity. The District Court specifically stated in the Summary Judgment that Officer Salimes had seized Mr. Schlessinger within the meaning of Fourth Amendment seizure:

> Viewing the facts in a light most favorable to Mr. Schlessinger, a reasonable person could conclude that he was not free to leave; Officer Salimes had seized him.

Respondents now imply in their Brief in Opposition that the District Court's finding of seizure of Mr. Schlessinger within the meaning of the Fourth Amendment should be completely disregarded. Respondents further advocate the position that it is appropriate to completely disregard the Constitutional rights of Mr. Schlessinger by foregoing legal analysis on the issue of qualified immunity including the issue of Fourth Amendment seizure in the appeal decision. Clearly, the Constitutional rights of individuals were not created to disregard so easily as respondents suggest to this honorable Court.

**_De Novo_ Review Still Requires the Seventh Circuit to Stay Within Case Facts and Relevant Case Law**

While the *de novo* standard of review does allow the Seventh Circuit to make entirely new conclusions of law, the Seventh Circuit is still within the confines of the case facts and relevant case law when making its conclusions of law. A qualified immunity claim must be reviewed in the light most favorable to plaintiff appealing the qualified immunity claim and according him the benefit of all reasonable inferences. *Simmons v. Pryor,* 26 F.3d 650, 653 (7th Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1833, 128 L.Ed.2d 461 (1994). See the Petition for details concerning the various ways the Seventh Circuit used to give all the credibility and benefit to the defendants while giving no credibility and benefit to the plaintiff. *De novo* review does not give the Seventh Circuit the discretion to review this case in the light most favorable to defendants. Seventh Circuit is required to construe the case in the light most favorable to the Petitioner.

Additionally, in *Elder v. Halloway,* this Court held that appellate review of qualified immunity disposition is to be conducted in light of *all* relevant precedents, not simply those cited to or discovered by the district court. *Elder v. Halloway,* 510 U.S. 510, 511, 114 S.Ct. 1019 (1994) (emphasis added). *All* relevant precedents include *all* of the qualified immunity case law and the Fourth Amendment seizure case law cited in *Kernats v. O'Sullivan,* 35 F.3d 1171 (7th Cir. 1994). See the Petition of this case where the *required* tests are cited and the case facts are then applied to these tests. The case of *Kernats v. O'Sullivan* was raised by petitioner but ignored by the Seventh Circuit. *De novo* review does not give the Seventh Circuit

the discretion to skip legal analysis concerning the relevant precedents of qualified immunity and Fourth Amendment seizure. Further, the Seventh Circuit's opinion raises the issue of waiver but fails to acknowledge that it reviewed the appeal *de novo* and went outside the record and construed the case in light most favorable to the defendants.

### The Contextual Setting of the Case Proves that Mr. Schlessinger was not Disorderly

The District Court did not even mention the possibility of disorderly conduct being reasonable. Respondents have advocated the Seventh Circuit's view that the mere fact that Mr. Schlessinger's affidavit in opposition to the summary judgment did not explicitly state that he was not "disorderly" proves disorderly conduct and makes it appropriate for the Seventh Circuit to avoid going through the qualified immunity analysis. This is flawed reasoning because the federal court system has never required affiants to specifically negate the exact wording of the opposing parties' affidavits and say, "Affiant was *not* 'disorderly.' Affiant was *not* 'obnoxious.' " Mr. Schlessinger's affidavit that demonstrates through the context that Mr. Schlessinger was not disorderly is perfectly acceptable. The contextual setting and case facts as found in the Summary Judgment also show that Mr. Schlessinger was not disorderly.

Respondents cannot explain away how Officer Salimes' threat of arrest in order to have Mr. Schlessinger pay for the food is reasonable basis for arresting for disorderly conduct. Mr. Schlessinger did not violate a

law. Payment for food that he did not eat is *not* an element of disorderly conduct. Officer Salimes did *not* tell Mr. Schlessinger to leave the premises or be arrested for disorderly conduct. Mr. Schlessinger was *not* free to leave the premises until he paid the food bill. If disorderly conduct was really at issue in this case, Mr. Schlessinger would have been free to leave the premises without paying the food bill. When the facts are looked at carefully, it is clear that the point of Officer Salimes's threat of arrest and handcuffing was to get Mr. Schlessinger to pay the food bill and not about disorderly conduct at all.

**Facts in the Case do not Support Fraud on the Innkeeper Statute, Wis. Stat. § 943.21**

Respondents have completely confused the policy and elements of the Fraud on the Innkeeper statute, Wis. Stat. § 943.21. Under this statute, the actor *must* abscond without paying for the food. Respondents have argued that the words, "absconding" and "clandestinely" have nothing to do with *secrecy* or *hiding* away. The word "abscond" is specifically used in this statute to describe the type of secretive behavior this statute was designed to address. The facts of this case demonstrate that Mr. Schlessinger did *not intentionally abscond*. The Fraud on the Innkeeper statute further requires an "intent to defraud." Mr. Schlessinger was willing to pay for his dinner when he got his proper order. Mr. Schlessinger was never given his proper order. The facts of this case do not support fraud. Respondents attempt to stretch this statute out to include *anything* in which the innkeeper does not like or "consent." This interpretation is over

broad. The plain meaning of the statute *requires* "absconding," which clearly did not happen. The Fraud on the Innkeeper statute does not apply because *none* of its required elements are met. Further, Officer Salimes threatened an arrest based upon disorderly conduct and *theft*, not fraud on the innkeeper.

**Qualified Immunity Appeal had Merit because the District Court Ruled that Officer Salimes had Seized Mr. Schlessinger Within the Meaning of the Fourth Amendment**

This case is *not* a sanctionable case. Respondents expended a great deal of their response to the citing of a large set of cases describing in detail the meaning of the words "frivolous" and "sanction." However, sanctioning is governed by the *facts of the case*. Nothing that respondents say to bypass this specific statement of seizure dents the fact that it was the District Court's position (and not just the petitioner's position) that Officer Salimes had seized Mr. Schlessinger within the meaning of the Fourth Amendment.

Respondents imply that the decision of the District Court should play no part in the issue of sanctioning. It is necessary for this Court to consider the District Court's legal analysis because it is that position upon which the appeal was based. The sanctioning issue concerning whether the filing of the appeal was frivolous *must* be addressed *at the point in time at which the decision to appeal was made*: the point in time which begins directly after the District Court's decision and ends directly at the point of filing the appeal. Clearly, this case is not sanctionable because this qualified immunity appeal was based on the

fact that the District Court specifically found that Mr. Schlessinger was seized within the meaning of the Fourth Amendment.

Petitioner questions the integrity of respondents asking for sanctions and double costs concerning this Petition when respondents are acutely aware that the District Court specifically found that Officer Salimes had seized Mr. Schlessinger under the meaning of the Fourth Amendment. There has never been an integrity question about the District Court and its legal analysis and conclusions, which clearly show the merits of this case.

**The Supreme Court Defined the Legal Term "Embroilment" and Use of "Embroilment" is not a Personal Attack on the Seventh Circuit**

The Court of Appeals decision contains comments and words that make the appeal decision biased and partial on the fact of the opinion. The word "embroilment" is the correct legal terminology to use for the issue of bias and partiality that is being addressed. It is a legitimate due process concern based on Supreme Court case law as well as Seventh Circuit case law.

Respondents have stated to this Court that petitioner's claim of embroilment is "inaccurate," basing this statement primarily upon respondents' assertion that embroilment can only be used for negative bias in the presence of the jury during a murder trial. Respondents did not acknowledge the *other* embroilment case cited in the Petition, *Bakalis v. Golembeski*, 35 F.3d 318, 323 (7th Cir. 1994). *Bakalis* involved a qualified immunity civil dispute concerning the issue of whether the record reflected a

"running controversy" between the college board of trustees as adjudicators and plaintiff whose employment was terminated. *Bakalis v. Golembeski* demonstrates that the issue of embroilment is an issue that is to be applied to all types of cases, both criminal and civil, in which there is a record that reflects bias and partiality. Embroilment is a claim which appropriately applies to this case.

**Due Process Requires More Than the Mere Technicalities of Notice and Chance to Respond**

Respondents have asserted that there is no Constitutional due process violation simply because the Seventh Circuit gave notice of its plan to award sanctions and gave an opportunity for petitioner to respond. Petitioner agrees that notice of the plan to sanction was given and that petitioner was given a chance to respond. However, because of the tone, words, comments, the lack of legal analysis concerning qualified immunity and Fourth Amendment seizure, and the failure of the Court of Appeals to view the facts in the light most favorable to petitioner in the Court of Appeals decision, and the omissions, changes, and diminishments of important facts, petitioner felt that the chance to be *meaningfully heard* concerning the sanctioning was futile and viewed the chance to respond as a formality so that petitioner would not be accused of waiving rights of due process.

Due process requires more than mere technicalities of allowing a chance to respond, as respondents suggest. There must be the opportunity to be "meaningfully heard" by judges who have not already made up their minds. The strong tone, words, and comments concerning

the case being frivolous and sanctionable, including the comments "frivolous at the outset," "goofy lawsuit," "contentention is nutty," "loopy thesis," "Schlessinger's lawyer (yes, he has one)," of the Seventh Circuit's opinion gave the judges no option but to sanction or openly disregard a large portion of their opinion concerning sanctioning and frivolous appeal. Thus, the chance to respond was a mere formality and not the due process guaranteed by the Constitution.

Further, there is very limited due process given concerning the issue of sanctioning. The only impartial due process procedure left, after the judges who have already set the case in stone as being "frivolous at the outset" in the opinion, is the chance of being heard in a discretionary appeal, the Writ of Certiorari, to the Supreme Court. Because of the limited amount of due process given concerning the issue of sanctioning, petitioner has very legitimate due process concerns about responding to a sanction notice concerning thousands of dollars before judges with immovable views.

**Why the Supreme Court Should Grant This Petition**

The Seventh Circuit published its opinion of this case which gives police officers permission to arrest consumers of restaurants, hotels, grocery stores, department stores, as well as all other types of stores, shops, and services if the consumers are not willing to pay for subquality goods or services. A consumer dispute has never been a misdemeanor or crime. A consumer dispute has always been a civil dispute in which the parties are allowed to bring their arguments to civil court. Allowing

police officers to threaten arrest and handcuff consumers is fundamentally wrong and chills consumers' equitable rights to pay a fair and just price for a quality product or service. The Supreme Court must not allow the Seventh Circuit's opinion to take precedence over common sense and grant police officers this unwarranted and uncontrolled power.

The sanctioning issue of this case is also an extremely important and timely issue for the Supreme Court to address. The Supreme Court needs to address to all judges the specific requirements of legal analysis and due process when using the power to sanction. These requirements should at minimum include the following: 1) the appearance of impartiality of the tribunal in written communications and opinions; 2) a detailed legal analysis applying case facts to all relevant case law which clearly and unequivocally demonstrates the claim's meritless or frivolous nature; and 3) recognition and deference given to a District Court's legal analysis and decision that supports the claim's meritorious nature. These requirements would help differentiate between sanctionable claims and the claims of merit or the parties or legal counsel for which the tribunal has adverse feelings.

The Supreme Court should also grant this Writ of Certiorari to directly deal with abuse of sanctioning. Abuse of sanctioning, especially when publicly recognized but not corrected in any way, deeply cuts away at the integrity of the entire Federal judicial system. The *ABA Journal* in April, 1997 edition, the article, "Paper Trailblazer," by Alexander Wohl, cited a 1994 Chicago Council of Lawyers study of the Seventh Circuit which

criticized a Seventh Circuit judge for being condescending and demeaning to lawyers, giving "short shrift to the facts," and for an abuse of sanctions of attorneys (page 72). Petitioner's claims in this petition, while filed before the printing of this article, include the same claims as found in this study. While the Chicago Counsel of Lawyers can study and find abuse of sanctioning and the *ABA Journal* can nationally report about abuse of sanctioning, only the Supreme Court has the power to create case law that directly tells judges that, "No! Abuse of sanctioning is not tolerated in the United States Judiciary."

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